

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-895

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

—v.—

INTERNATIONAL VAN LINES,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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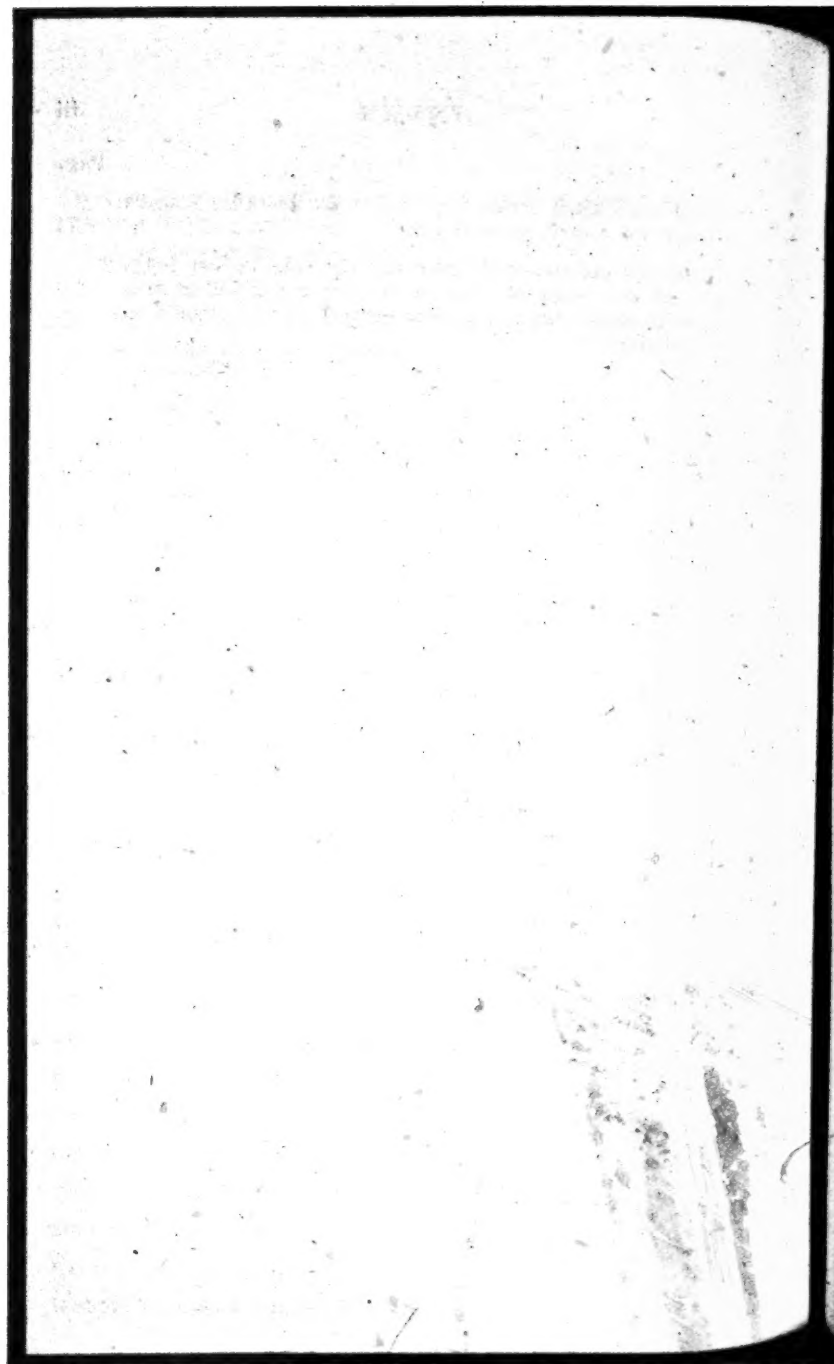
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[The Board's decision and order and the opinion and judgment of the court of appeals are not reprinted in this appendix since they are already printed as an appendix to the petition.]



## RELEVANT DOCKET ENTRIES

- 10.12.67 Charge, dated
- 11.29.67 Complaint and Notice of hearing, dated
  - 1. 4.68 Answer to Complaint, dated
  - 4. 3.68 Hearing opened
  - 4.11.68 Hearing Closed
- 7.18.68 General Counsel's motion to correct transcript, dated
- 8. 5.68 Respondent's objections to General Counsel's motion, dated
- 11.20.68 Trial Examiner's order correcting transcript, dated
- 11.20.68 Trial Examiner's Decision issued
- 12.23.68 General Counsel's exceptions, received
- 6.30.69 Board's Decision and Order issued
- 4.18.70 Board's application for enforcement filed
- 5.20.70 Certified record mailed
- 1.14.71 Argument held
- 9. 3.71 Opinion and judgment issued by the Ninth Circuit
- 9.10.71 Respondent's petition for rehearing dated
- 9.17.71 Board's petition for rehearing filed
- 10.12.71 Court's order denying petition for rehearing
- 1.10.72 Board's petition for certiorari filed
- 2.28.72 Order of United States Supreme Court granting certiorari

[2]

**BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRTY-FIRST REGION**

**Case No. 81-CA-855**

**In the Matter of:**

**INTERNATIONAL VAN LINES,**  
*Respondent,*  
**—and—**

**TEAMSTERS AND WAREHOUSEMEN, LOCAL 381, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,**  
*Charging Party.*

Council Chambers, City Hall,  
110 East Cook Street,  
Santa Maria, California,  
Wednesday, April 3, 1968.

The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 a.m.

**BEFORE:**

**DAVID F. DOYLE, Trial Examiner.**

**APPEARANCES:**

**MRS. EARLDEAN V. S. ROBBINS**  
National Labor Relations Board,  
Thirty-First Region,  
215 West Seventh Street,  
Los Angeles, California,  
appearing as counsel for  
the General Counsel.

[3] APPEARANCES:  
(continued)

W. THOMAS ARRUDA,  
Labor Relations Consultant  
2150 Franklin,  
Oakland, California,  
appearing on behalf of  
the Respondent.

BEN SANDERS  
115 West Bunny Street,  
Santa Maria, California  
98454, appearing on behalf  
of the Charging Party.

[4]

PROCEEDINGS

MRS. ROBBINS: Appearing for the General Counsel,  
Earldean V. S. Robbins, 10th Floor, Bartlett Building,  
215 West Seventh Street, Los Angeles, California 90014.

TRIAL EXAMINER: Thank you.

And, for the Company?

MR. ARRUDA: Appearing for the Respondent, W.  
Thomas Arruda, 2150 Franklin Street, Oakland, California.

TRIAL EXAMINER: Are there any other appearances?

MR. SANDERS: Yes.

Ben Sanders appearing for the Charging Party.

TRIAL EXAMINER: And will you give us your office address, Mr. Sanders and your official connection with the Charging Party if you have one.

[5] MR. SANDERS: I am secretary-treasurer of the Teamsters Union, 115 West Bunny Street, Santa Maria, California.

[11] MRS. ROBBINS: The parties stipulate that what has been marked for identification as General Counsel's Exhibit Number 2 is a true and correct copy of a telegram sent by Respondent to Manuel A. Vasquez, on Oc-

tober 5, 1967 and may be received into evidence as General Counsel's Exhibit Number 2.

TRIAL EXAMINER: You so stipulate?

[12] MR. ARRUDA: So stipulated, Your Honor.

TRIAL EXAMINER: The stipulation is accepted, and General Counsel's Exhibit Number 2 is received in evidence.

\* \* \*

MRS. ROBBINS: The parties further stipulate that on October 5 Respondent sent a telegram to employee Robert Vasquez which is identical to the telegram marked as General Counsel's Exhibit Number 2, and that Respondent will later in the hearing furnish copy of such telegram, and it may be received into evidence as General Counsel's Exhibit 3.

TRIAL EXAMINER: Do you so stipulate?

MR. ARRUDA: Did you say General Counsel's Exhibit 2 as to Robert Vasquez?

MRS. ROBBINS: 3.

MR. ARRUDA: So stipulated, Your Honor.

[13] TRIAL EXAMINER: The stipulation is accepted, and General Counsel's Exhibit Number 3 is received.

\* \* \*

MRS. ROBBINS: The next stipulation is that on October 5, 1967, Respondent sent a telegram to employee Richard L. Dicus, that General Counsel's Exhibit Number 4 is a true and correct copy of said telegram, and the telegram may be received into evidence as General Counsel's Exhibit Number 4.

TRIAL EXAMINER: Do you so stipulate?

MR. ARRUDA: So stipulate, Your Honor.

TRIAL EXAMINER: The stipulation is accepted.

You intend to offer that now?

MRS. ROBBINS: Yes, Your Honor.

I have here 2 and 4.

TRIAL EXAMINER: Exhibit 4 is a copy of a telegram that you mentioned.

MRS. ROBBINS: Yes.

TRIAL EXAMINER: And there being no objection exhibit 4 is received in evidence, also.

MR. ARRUDA: No objections, Your Honor.

**TRIAL EXAMINER:** The documents are received, and you will furnish Exhibit 3 as has been stated.

\* \* \*

[14] **MRS. ROBBINS:** We further stipulate that what has been marked for identification as General Counsel's Exhibit 5 is a true and correct copy of an authorization for representation under the National Labor Relations Act, that the signature is an authentic signature of Richard Dicus, and that it was signed on the date it bears, August 23, 1967.

I now offer General Counsel's Exhibit Number 5 into evidence also.

\* \* \*

[15] **MRS. ROBBINS:** General Counsel's Exhibit Number 6, Robert Vasquez;

General Counsel's Exhibit Number 7, Manuel A. Vasquez;

General Counsel's Exhibit Number 8, David Dicus;

General Counsel's Exhibit Number 9, David Poncetta;

**TRIAL EXAMINER:** Pursuant to the stipulations, each one of the exhibits is received in evidence and marked with the number assigned to each by the General Counsel, and these are received under the same terms of stipulation as the first authorization card was received.

\* \* \*

**MRS. ROBBINS:** The next stipulation is that at all times material herein, W. Thomas Arruda was an agent of Respondent acting in its behalf within the meaning of Section 213 of the Act.

**TRIAL EXAMINER:** Do you so stipulate to that, Mr. Arruda?

**MR. ARRUDA:** So stipulated.

I was the labor advisor and attorney for the company. So stipulated.

**TRIAL EXAMINER:** The stipulation is accepted.

\* \* \*

[21] **MRS. ROBBINS:** We have agreed to a stipulation, that on September 21, 1967, the Charging Party herein filed a representation Petition in Case Number 31-RC-666 requesting a usage of all truck drivers,—a

unit of all truck drivers, [22] packers, craters, order-fillers, checkers, warehousemen, loaders, helpers and working foremen employed by International Van Lines at its Santa Maria, California location;

Excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and we further stipulate that this notification of this Petition was received by Respondent on September 25, 1967.

\* \* \* \*

[23] TRIAL EXAMINER: All right.  
The stipulation is accepted.

[25]

\* \* \* \*

BEN H. SANDERS

was called as a witness by and on behalf of the General Counsel, \* \* \*

#### DIRECT EXAMINATION

\* \* \* \*

[26] MR. ARRUDA: We will stipulate that Mr. Ben Sanders is a secretary-treasurer of the union, and we can eliminate preliminaries.

\* \* \* \*

Q (By Mrs. Robbins) Directing your attention to the summer of 1967, did your union start an organizational campaign among the employees of moving and storage companies in Santa Maria?

A Yes, they did.

\* \* \* \*

[27] MRS. ROBBINS: The parties have agreed to a stipulation that during the first part of August, 1967 an employee in the manufacturing and storing industry in Santa Maria, Mr. Harold Tanore approached Teamsters Local 381 regarding organizing the employees of all of the employers in the moving and storage industry in and around Santa Maria.

Subsequent to this, still in the month of August, 1967, Teamsters Local 381 did begin an organizational cam-



paigned among the employees of some 11, 10 or 11 employers who owned around 23 moving and storage companies in and around Santa Maria.

Certain organizational meetings were held on August 17 and August the 23rd.

[28] TRIAL EXAMINER: The stipulation is accepted up to that point.

[30] Did there ever come a time when you had a meeting when you discussed picketing International Van Lines?

MRS. ROBBINS: Or the possibility of picketing International Van Lines, Mr. Sanders?

[31] THE WITNESS: Yes, I did.

[34] Q (By Mrs. Robbins) When did this meeting take place, Mr. Sanders?

Q (By Mrs. Robbins) Where was the meeting held?

A 117 West Bunny Street in the Carpenters Hall.

TRIAL EXAMINER: What time of the day?

THE WITNESS: Santa Maria, California.

If I recall, it was in the evening.

TRIAL EXAMINER: Who was there?

THE WITNESS: All of the employees of all of the van line companies in Santa Maria.

TRIAL EXAMINER: Go ahead.

Q (By Mrs. Robbins) As nearly as you can recall, Mr. Sanders, what was discussed at this meeting?

A There was a general discussion on the organizational drive and we had been advised that the company—

Q Just tell us what was said. If somebody said this, fine, but no background.

A This was said by myself—

[35] Q All right.

A —to the members attending the meeting that some companies, including International Van Lines had withdrawn their consent to an election, and we were going to

have time to—wanted to have time to check it out to make sure that it was right.

THE WITNESS: Well, we had heard that three companies that we filed elections on had withdrawn their consent to include the International Van Lines. It was not certain about International Van Lines that they had at that time—we wanted—we were going to check it out the following day.

Q (By Mrs. Robbins) Did you on that night make arrangements for a subsequent meeting?

A Yes, we did. We made arrangements that night to hold another meeting on the following night of October 3rd.

Q Where was this meeting held?

A In the same location.

Q Who was present?

A Myself and the members of the Van Lines in Santa Maria.

[36] Q Does that mean the employees of the van lines?

A Employees.

Q Was there a chief spokesman at this meeting?

A Yes, there was.

Q You were—

A Yes.

Q As nearly as you can recall, will you tell us what occurred at this meeting.

A I announced to the employees attending the meeting that we had checked with our legal counsel and found that International Van Lines and the other van lines that we had filed elections on and the companies that had consented to an election had withdrawn their consent for an election.

[38] Did you discuss International Van Lines?

THE WITNESS: Yes, we did.

TRIAL EXAMINER: What was said about International Van Lines?

THE WITNESS: It was said that we would strike them the following morning, because they withdrew their consent to an election.

TRIAL EXAMINER: Go ahead, Mrs. Robbins.

Q (By Mrs. Robbins) Then the next morning did you strike International—

A Yes, we did.

Q —Van Lines?

A Yes.

Q Is that strike still going on?

A Yes, it is.

Q The next morning would have been October 4th?

A That is correct.

\* \* \*

[39]

### CROSS-EXAMINATION

Q (By Mr. Arruda) Mr. Sanders, you stated that you contacted your attorney, and he told you that International Van Lines had withdrawn its consent; is that correct?

A Correct.

Q Did he explain to you what—incidentally, when you were referring to "consent", were there any documents prepared by myself in behalf of the company or before the National Labor Relations Board consenting to an election, that you know of?

A I don't know.

Q You do not know that?

A I don't.

Q You stated that you talked to your attorney on October 3rd and you checked this out with him. He advised you that the International had withdrawn its consent.

A Correct.

Q Did your attorney advise you where he got this information from?

A If I recall correctly, I believe he said that he had gotten in touch with the National Labor Relations Board. I don't recall the name of the person at the National Labor Relations Board, and he had been told that you had gone in and withdrawn all of the consents to the elections on the three petitions that had been filed.

[43] Q (By Mr. Arruda) These pickets were placed in the front or in and around the premises of International Van Lines; is that correct?

A Correct.

[44] A That we placed pickets on International Van Lines.

Q On the basis of the information you received from your attorney on October 3, 1967; is this correct?

A That is correct.

. . . .

[45]

### REDIRECT EXAMINATION

Q (By Mrs. Robbins) Mr. Sanders, I believe Mr. Arruda asked you if the information that you received from your attorney was the reason pickets were placed on International Van Lines, and you answered yes.

Was this the sole reason?

A No.

. . . .

Q (By Mrs. Robbins) What were the other reasons?

A The other reasons, other employees from other companies were being dismissed.

. . . .

[46] MRS. ROBBINS: Excuse me, Mr. Arruda. They may have picketed because the sky turned black, and International Van Lines didn't have anything to do with it, but it is still the reason why.

MR. ARRUDA: What does that have to do with International?

TRIAL EXAMINER: I will overrule the objection, and I will let it stand. I am letting it stand on the basis it is no reason whatsoever that I can see under the law for picketing International Van Lines.

. . . .

TRIAL EXAMINER: Overruled. I will let the answer stand, because the answer illustrates that the basis for the picketing at International Van Lines appears now to have been on the basis of information, the correctness of which this man knew nothing about, and because somebody other than International [47] Van Lines had fired some employees, and as far as the law is concerned, I do not consider that as any sort of an adequate reason for

this picketing, and I will let it stand for that reason. It is definite evidence that the union in regard to International Van Lines, according to this point in the proceedings, acted without any proper reason.

\* \* \*

BEN H. SANDERS

was recalled as a witness by and on behalf of the Respondent \* \* \*

[48]

### DIRECT EXAMINATION

Q (By Mr. Arruda) Mrs. Sanders, General Counsel's Exhibits—I believe they have been identified as Exhibits 5, 6, 7, 8 and 9, authorization cards, did you have anything to do with securing these authorization cards?

A In what respect?

Q Obtaining—

A Actually getting them signed?

Q Yes.

A No, I did not.

\* \* \*

[49] TRIAL EXAMINER: Strike the answer.

Q (By Mr. Arruda) Did you personally contact the Employer?

A No, I did not personally.

Q Did any representatives, to your knowledge, contact the Employer?

A What are you referring to as a representative?

Q Mr. Murray.

A No, not Mr. Murray, no.

TRIAL EXAMINER: Did any officer of the union approach the Employer?

THE WITNESS: No officer of the union approached the Employer. Mr. Tanore approached the Employer, as I understood.

MR. ARRUDA: I move that be answered, as Mr. Tanore is not an employee of the union.

THE WITNESS: He sure is not, and never will be.

Q (By Mr. Arruda) Mr. Sanders, on what basis did you file a petition for an election with the National Labor Relations Board?

[50] THE WITNESS: We had 100 per cent.

Q (By Mr. Arruda) How did you determine that you had 100 per cent?

A By the employees working for International Van Lines.

Q Did you check the payroll record of the employees to determine who was eligible and who was not eligible to vote?

A No, I did not.

Q Would I be correct in saying then, you unilaterally took it upon yourself to see that you had 100 per cent of the majority of cards without even bothering checking the record of the employer?

A That would have been impossible. You know it, and I know it. That is a rather stupid question, I think.

Q It may be stupid, but it is a legal question.

TRIAL EXAMINER: Strike that out. No argument between counsel and witness.

MR. ARRUDA: I do not want to argue with the witness. I am asking a specific question.

TRIAL EXAMINER: Ask the question, and I will strike out any answer which is not a specific answer.

MR. ARRUDA: Would you mind answering my question?

THE WITNESS: What was your question? Will you state your question again?

MR. ARRUDA: Would you read that back, Mr. Reporter.

TRIAL EXAMINER: Read the question.

[51] (Question read.)

TRIAL EXAMINER: Do you understand the question?

THE WITNESS: I understood from the other employees of International Van Lines that we had 100 per cent of the employees signed up at International Van Lines.

Q (By Mr. Arruda) Mr. Sanders, you based the reason for filing the petition solely on what other employees had told you; is this correct?

A That is correct.

Q And you never contacted Mr. Robert McEwan or John McEwan?

A I did not personally, no.

Q Or any one of your delegated representatives?

A Not that I know of.

\* \* \*

[52]

RICHARD DICUS

was called as a witness by and on behalf of the General Counsel \* \* \*

### DIRECT EXAMINATION

\* \* \*

Q Are you the same Richard Dicus that worked for International Van Lines in and up to October 4, 1967?

A Yes, ma'am.

Q When did you first start working for International?

A February of 1963.

Q What was your job there?

A Driver.

Q Did you work as a driver all of the time that you worked at International Van Lines?

[53] A Yes, ma'am.

Q And you are the Richard Dicus that received a telegram from International Van Lines on October 5—

A True.

Q —saying you had been permanently replaced?

A Yes.

\* \* \*

Q Mr. Dicus, if you know, about how many employees worked regularly all year around at International Van Lines while you were working there?

A Well, we had anywhere from four to six men all the time, and sometimes quite a bit more.

Q Is there any one time of year when there were more employees working?



A. Yes.

MR. ARRUDA: We are prepared to stipulate from approximately April or March—May, rather, May through September, which is the peak season in the moving industry in the Santa Maria and Lompoc area, that the Employer employs more than just “four to six”, that the witness has testified to.

MRS. ROBBINS: That is May to—

[54] MR. ARRUDA: Approximately May to the early part of September of each year.

MRS. ROBBINS: All right.

And is it correct, Mr. Arruda, that business starts picking up in May, but does not really get heavy until after school, June, July?

MR. ARRUDA: Approximately July, and then it starts to dissipate or take a noted dive, say, the first week or second week of September, right down to nothing.

MRS. ROBBINS: All right.

I will so stipulate.

TRIAL EXAMINER: All right. The stipulation is accepted.

Now, I think you had better have some limits on this. At the low season it is how many, and at the high season, approximately how many?

. . . . .

[56] TRIAL EXAMINER: On the record.

As I understand it, in an off-the-record discussion counsel have agreed that there is a seasonal change in the number of employees employed by International Van Lines, and that counsel will prove that fluctuation is from a low to a high.

MRS. ROBBINS: Your Honor, I believe the stipulation went further than that.

TRIAL EXAMINER: And as I understand it, the fluctuation occurs from about the end of June until about the beginning of September, that being the months in which much work is done for the Air Force moving in and out of the air base over at Vandenberg Air Force Base.

Correct?

MR. ARRUDA: Correct, Your Honor.



MRS. ROBBINS: That is correct.

TRIAL EXAMINER: The stipulation is accepted to that extent.

[74] Q (By Mrs. Robbins) Mr. Dicus, on October 4, 1967 did you go to International Van Lines office and warehouse, their building, on October 4?

THE WITNESS: Yes, I did.

Q (By Mrs. Robbins) About what time of day was it?

A About 15 minutes until seven.

Q Would you tell us what occurred after you got there, Mr. Dicus?

TRIAL EXAMINER: Is this morning or afternoon?

[75] THE WITNESS: It is in the morning.

Well, when I got there, there was two men picketing in the front of the building, and I stood there for a minute, and Mr. Meador came to the office door and I asked him, "What goes here?"

And he says, "I don't know." And he turned around and went back in the office. And then it was just a few minutes later until Mr. Bob McEwan drove up and he went into the warehouse and came back out with a cup of coffee in his hand, and said, "Where is your union contract?"

He says, "I have not even seen a union contract."

And I said to Mr. McEwan, I said, "Well, Bob, we was told that at the union meeting last night, and also by the pickets that your name had been withdrawn from an election, and all we wanted was a chance to vote against it or for it."

And I asked Mr. McEwan if—no—he says, "I had not pulled my name. I have not withdrawn my name for an election."

And he looked very surprised whenever I said it to him, and I asked him then if I could come in the office and call the union, and that we could have a contract out there in about 10 minutes, and if he would look it over,

and he told me, "Hell, no. I am not signing anything." And he went back [76] into the office.

Q (By Mrs. Robbins) Was anyone else present during this conversation with Robert McEwan?

A Well, yes, ma'am. Mr. Manuel Vasquez arrived then, and Sal Casillas, C-a-s-i-l-l-a-s, Mr. Robert Vasquez was there, and there was other men that I don't recall their names, because we had quite a crew coming in that day to do some office moves.

Q Did you walk the picket line in front of International Van Lines, Mr. Dicus?

A No, I did not.

Q At no time?

A No, ma'am.

TRIAL EXAMINER: When you had the conversation, you just told us, were the pickets there?

THE WITNESS: Yes.

TRIAL EXAMINER: The place where you had the conversation?

THE WITNESS: Yes.

TRIAL EXAMINER: Did you know the pickets?

THE WITNESS: Did I know the pickets?

TRIAL EXAMINER: Yes.

THE WITNESS: Just by sight. I don't know the gentlemen well.

TRIAL EXAMINER: Were they employees of International Van Lines?

[77] THE WITNESS: No.

TRIAL EXAMINER: I am sorry. One other question. This conversation where you were standing when the conversation took place, I did not get whether Mr. McEwan came out to the picket line or whether you went out the door.

Where did it occur?

THE WITNESS: Out where we park our cars. Mr. McEwan came out there.

TRIAL EXAMINER: All right.

And then the men gathered around him, and you had this conversation in a group?

THE WITNESS: Yes.

Q (By Mrs. Robbins) Mr. Dicus, did you picket anywhere else?

A Yes, ma'am, I did.

I went down to a telephone about a mile from there, and I called the union office, and I believe Mr. Murray answered the phone, and I told him what Mr. McEwan had said, and I thought maybe if they would come out and show him a contract or talk to him about a contract, that he might consider it.

And I was told then, again, that his name had been withdrawn, and for me to go over to Valley Van & Storage.

[78] Q And that is where you picketed?

A Yes, sir.

Q Have you had any conversations since then with Mr. Robert McEwan, either about the union or about you getting your job back?

A Yes, ma'am.

Q One, or more than one?

A I recall three occasions.

Q When was the first one, as nearly as you can recall?

A While Mr. McEwan was in the hospital.

Q But when was this?

A I would say October 8th or 9th.

Q Was anyone else present?

A Mr. McEwan's father.

Q As nearly as you can recall, what was said?

A Well, mostly talk about Mr. McEwan's illness, and also—

Q How about the union and your job?

A Well, I asked Mr. McEwan if I was going to have a job or not, and he told me that he just did not know. He said he did not know how this thing was going to come out. He could not say whether I would have a job or not.

Q What else was said, if anything, about the union or about your job?

A That is all I can recall.

Q When did the second conversation take place?

[79] A Well, I am not sure as to the date. It was after Mr. McEwan got out of the hospital and he came back to work.

Q Do you recall what month it was?

A It was in October, the latter part of October.

Q Where did this conversation take place?

A In Mr. McEwan's office.

Q Was anyone else present?

A Yes, ma'am. My wife and Mr. Meador.

Q As nearly as you can recall, what occurred?

A Well, really about the same thing, as far as union is concerned. I asked Mr. McEwan if I was going to have a job, and he told me practically the same thing.

He says, "I don't know. I don't know how this thing is going to turn out." He says, "As far as I am concerned, it is the principle of the thing." That was just about the extent of the union talk.

. . . . .

Q (By Mrs. Robbins) What I am trying to find out, Mr. [80] Dicus, if you recall, did you ask him could you go back to work then, or were you asking him about getting back to work after the strike was over, or any other time?

A This particular time I asked him after the strike was over.

TRIAL EXAMINER: What did he say?

THE WITNESS: He said he just did not know how this was all going to turn out, and he just could not tell me right now.

. . . . .

[81] Q Did there come a time when you asked to have your job back, Mr. Dicus?

A Yes, ma'am.

Q When was this?

A It was in December before Christmas. Mr. Vasquez, Robert [82] Vasquez,—

Q Can we place it a little better than just before Christmas?

Do you recall whether it was very close to Christmas or close to the first of December?

A I believe it was around the 12th of December.

Q The 12th of December?

A Yes, ma'am.

Q To whom did you talk about getting your job back?

A To whom did we talk?

Q Yes. Whom did you ask?

A We asked Mr. McEwan.

Q That is Mr. Robert McEwan?

A Yes, ma'am.

Q Who was present?

A Mr. Manny Vasquez and Mr. Robert Vasquez and myself.

Q Was this Manny Vasquez, Robert Vasquez there when you arrived, or did you go together?

A No, ma'am. We went together. We had discussed it before, and decided to go out there and see if Mr. McEwan would give us our jobs back.

Q As nearly as you can recall, would you tell us what was said, and who said what?

A Well, Manny Vasquez asked Mr. McEwan if he would consider giving us our jobs back.

[83] And Bob says, "No." He says, "I cannot do it." He says, "I got men working for me that stuck by me through all this thing, and I just cannot go out there and fire them."

He says, "How would you guys feel if I put you back to work, and two or three weeks from now do the same thing to you?"

Of course Mr. McEwan always told us his door is open. If we care to come back, he would talk to us, but at the time, he said, he could not do it or would not do it.

He said he had four, five men working, but one of them had made him mad, and he said, "I did not fire him, because he had stuck by me through all this."

And we told him, well, there wasn't any hard feelings. We came out to talk to him, to try to get our jobs back, and that was about it.

Q Did you attend the October 3 union meeting?

A Yes, ma'am, I did.

Q Did you attend the one the night before, on October 2?

A Yes.

Q Did you attend the union meetings in August and September of 1967?

A I am sure that I was at all of the union meetings, yes.

. . . . .

## CROSS-EXAMINATION

[92] Q You testified that on October 4, 1967 when you were going to the office or going to work, rather, you saw these pickets, and Mr. Meador appeared in the office, and you asked what goes here?

A That is true.

Q What did you mean by that question? Can you tell me?

A I was refering to the men carrying the picket signs.

Q And you did not know there was a strike going on?

A So help me, I did not.

Q Sir, you further testified later on that you attended a meeting of October 3, 1967 at the union hall.

A That is true.

Q Was there any discussion had concerning the pickets to be placed around International Van Lines?

A None whatsoever.

Q There was none whatsoever?

A That I heard anything about.

Q Did you attend that meeting?

A Yes, I did.

Q Did you hear the testimony of Mr. Sanders here this morning concerning what was discussed on the meeting of October 3, 1967?

[93] A Yes, I did.

Q Wasn't the name of International Van Lines brought out during this meeting?

A Yes, sir. Mr. Arruda, what you do not know, I left the meeting before it was over with.

Q What time did you leave?

A Well, I don't have any idea what time it was, but my son and Mr. Manuel Vasquez walked out of that union meeting about half way through it, I suppose.

[94] A As far as I know there wasn't anything said on International Van Lines. International Van Lines' name was not mentioned. It was mentioned—there were three companies—

[95] Q Was International Van Lines mentioned at all during this meeting, during the time that you were there?

A Not that I recall, no, sir.

Q Wasn't there discussion about putting a picket line around International Van Lines at this meeting?

MRS. ROBBINS: I object. The witness said he did not recall International Van Lines being mentioned.

TRIAL EXAMINER: I will let the question go once more.

Do you mind answering that question, please?

THE WITNESS: Would you repeat it, please?

MR. ARRUDA: Read it back, please.

TRIAL EXAMINER: Read the question.

(Question read.)

THE WITNESS: No, sir, not that I heard.

Q (By Mr. Arruda) I ask you this, sir:

What caused you to walk out of this meeting?

A Well, we had been told that we were butting our heads up against a brick wall. We was not making some progress by talking to the employees, but the three people we had had consented to an election had withdrawn their names.

Q Was International Van Lines mentioned, who had withdrawn their consent to an election?

A Not at this meeting, no, sir.

\* \* \*

[117]

ROBERT VASQUEZ

was called as a witness by and on behalf of the General Counsel \* \* \*

\* \* \*  
DIRECT EXAMINATION  
\* \* \*

Q (By Mrs. Robbins) Are you the same Robert Vasquez that worked at International Van Lines?

A Yes, I am.

[118] Q When did you start working for International, Mr. Vasquez?



A About three years. I don't know exactly the date.

Q Did you thereafter work for International Van Lines up to October 4 of 1967?

A That's right.

. . . . .

[120] Q Did you receive a telegram in October the 5th from International Van Lines?

A Yes, I did.

. . . . .

[122] Q (By Mrs. Robbins) Mr. Vasquez, on October 4, did you go to the International Van Lines warehouse?

A Yes, I did.

Q Would you tell us what occurred after you arrived?

A Well, I left home about 15 until, 15 after 7:00, and I got there about—just starting to work time, 7:30, and Mr. Dicus, Mr. Richard Dicus and Mr. Many Vasquez, Jr. and Chuck Casilio—I mean, Casilio and Chuck—came out of the office, and he said, Mr. Dicus asked him, "What goes"?

And I don't know—and he turned around and closed the door and went inside, and then in a few minutes Mr. Bob McEwan came in, and he went inside the office and come back with a cup of coffee, and then Mr. Dicus asked him what happened, and then Mr. Dicus asked him, did he hear they had [123] withdrawn the elections. And then Mr. Dicus told him about seeing the contract, and he asked him—

Q Told him what about seeing the contract?

A What is that?

Q Told him what about seeing the contract?

A Seeing the contract, union contract.

Q Mr. Dicus said something to somebody about—

A To Mr. McEwan, yes.

Q All right.

Now, what did Mr. Dicus say to Mr. McEwan?

A He said, if he would like to see the contract.

Q Yes?

A And then Mr. McEwan turned around said, "Hell, no." And he walked out.

Q Mr. Vasquez, did you ever ask to have your job back?



A Yes, I did.

Q When was this?

A December 12.

Q Was this Mr. Robert McEwan that you asked?

A Right.

Q Where did this conversation take place?

A In his office.

Q Was anyone else present?

A Yes.

Mr. Manny, Jr.; Dicus and Mr. Bob McEwan, and me.

[124] Q Who was Manny, Jr.?

A I mean, Sr.

Q Is that Manny Vasquez, Sr.?

A Yes.

Q Did the three of you go together?

A Right.

Q As nearly as you can recall, would you tell us what was said and who said what?

. . . . .

MR. ARRUDA: In order to expedite the examination of this witness, would he testify the same as Mr. Dicus testified as to the meeting of December 12, 1967 where the three of them were together and asked for their jobs back?

If he would testify identical to that of Mr. Dicus, we would stipulate to that matter.

. . . . .

A Well, Manny asked him about us coming back to work, asked for our jobs back, and then he said, no, that he cannot give us our job because he had somebody else in our place. And it was not fair for the other man, and that how we [125] would like to be in their place and get laid off the same way. And then he said, not right then. They had no job for us and that we could be friends and come to the office any time we like, like this.

. . . . .

On the morning of October 4, when you went down to the plant or down to the place of business of International Van Lines, did you see a picket down there?

THE WITNESS: Yes, I did.

TRIAL EXAMINER: Was the picket carrying a picket sign?

THE WITNESS: Yes, they were.

TRIAL EXAMINER: What did the picket sign say on them?

THE WITNESS: It said "UNFAIR TO UNION LOCAL 381, INTERNATIONAL VAN LINES, NO CONTRACT."

. . . . .

[126] TRIAL EXAMINER: Did you know these pickets? Did you know who the pickets were?

THE WITNESS: I do, yes, but I cannot—I don't know them by name.

TRIAL EXAMINER: They were employees of International Van Lines?

THE WITNESS: No, they were not employees of International Van Lines.

. . . . .

[128]

### REDIRECT EXAMINATION

Q (By Mrs. Robbins) Mr. Vasquez, did you walk the picket [129] line?

A Yes, I did. I still am.

. . . . .

[150]

### SALVADORE CASILLAS

was called as a witness by and on behalf of the General Counsel . . .

. . . . .

[151]

### DIRECT EXAMINATION

. . . . .

Q Mr. Casillas, did you work for International Van Lines at any time in 1967?

A I did.

Q When did you start working?

A About September 20 something, I think it is. I am not positive on the dates.

Q During the last 10 days of September?

A That is correct.

TRIAL EXAMINER: Is this 1967?

THE WITNESS: Right.

Q (By Mrs. Robbins) Mr. Casillas, were you notified to come to work on—were you notified prior to October 4 to come to work on October 4?

A Yes, I was.

Q Who notified you?

A Chuck.

Q Is that Mr. Chuck Meador?

A That is correct.

Q Did you go to work at International Van Lines on October 4?

A I did not.

Q Did you go to the building on October 4?

[152] A I did.

Q Was a picket line up when you arrived?

A Yes, there was.

Q I gather by your saying you did not go to work, you did not cross the picket line?

A That is correct.

MRS. ROBBINS: Mr. Arruda, if you are still willing to stipulate that Mr. Casillas and Mr. Manny Vasquez would testify the same as Mr. Richard Dicus, as to the conversation that took place with Mr. Robert McEwan on the picket line, I would like to.

MR. ARRUDA: I would like to establish—have you established a time that he got there, so on and so forth?

As far as the conversation, yes, I am prepared to stipulate, but I would like to have him establish a time and so on.

MRS. ROBBINS: All right.

Q (By Mrs. Robbins) Mr. Casillas, what time did you get to International Van Lines?

A Seven o'clock.

Q Around seven o'clock?

A Yes.

It could be five after.

Q Who was there when you arrived?

A Richard Dicus, Manuel Vasquez.

[153] Q Were you there when Mr. Robert McEwan came up and had a conversation with some of the employees?

A That is correct. That would be around seven-thirty, though.

Q Who was present at that time?

A That would be Manny Vasquez, Robert Vasquez, Richard Dicus and myself.

MRS. ROBBINS: Is this what you wanted established, Mr. Arruda?

MR. ARRUDA: Yes.

MRS. ROBBINS: Then, I gather that counsel will stipulate that if Mr. Sal Casillas testified and if Mr. Manny Vasquez was called to testify about the conversation between Robert McEwan and other employees, at some time between 7:00 and 7:30 in the morning of October 4, they would testify the same as Mr. Richard Dicus testified?

MR. ARRUDA: This is correct.

Manuel Vasquez, Sr., also.

MRS. ROBBINS: Right.

MR. ARRUDA: And Robert Vasquez.

MRS. ROBBINS: Mr. Robert Vasquez has testified.

MR. ARRUDA: Yes.

MRS. ROBBINS: Yes.

TRIAL EXAMINER: The stipulation is accepted.

Q (By Mrs. Robbins) Mr. Casillas, did you walk the picket [154] line at International Van Lines?

A No, I did not.

. . . . .

[156] Q (By Mrs. Robbins) Mr. Casillas, did you attend the union meeting on October 3, 1967?

A I did.

Q Do you recall anything being said about International Van [157] Lines or picketing or strike at International Van Lines?

A I do.

. . . . .

Mr. Moore told us that there could be a reason to have this thing worked out and that he would do all he could, but he could not think of a solution to the problem of the strike.

We asked Mr. Moore to see if he could contact the rest of the employers in Santa Maria and maybe talk with them and see if they could find the problem—I mean, find a solution to this whole problem of the strike and maybe they could think of something.

Mr. Moore said he was sure glad to go over there, and he said possibly later, after talking to the employees, that we could come up with something, but he could not for sure think of anything at that moment.

\* \* \* \*

[253] TRIAL EXAMINER: What did you tell to Mr. Moore?

THE WITNESS: That we talked to Mr. McEwan and had asked him to sign a contract and that we wanted the strike settled and that we did not see why we could not sit down and talk about the contract, and he said that he could not do anything himself, but that he was going to consult his attorney and see what he could do, that he would—I was supposed to call him back and find out if we could talk again or have a [254] meeting of some kind.

\* \* \* \*

[255] THE WITNESS: We walked in, and we told Mr. McEwan that we were there to see if we could find some kind of a settlement on this strike deal, and Mr. Dicus did most of the talking naturally. We told him, or Mr. Dicus told him maybe we could reach some kind of a settlement there, and where we could all go back to work.

\* \* \* \*

THE WITNESS: We would like to see if we could make a settlement where we could all go back to work and maybe we could sign a contract, and Mr. McEwan told us that he could not—he was going to think about it and—

TRIAL EXAMINER: Did he say something about talking to [256] his lawyer, too?

**THE WITNESS:** Yes.

He had to get in touch with his lawyer. He could not make any arrangements or agreements of any kind until he talked to Bill—I guess that is Mr. Arruda, and—

. . . . .

**TRIAL EXAMINER:** All right.

Now, you mentioned, sign a contract.

Did you have any contract with you?

**THE WITNESS:** No, we did not have a contract with us. We had another meeting with Mr. McEwan afterwards.

**TRIAL EXAMINER:** When you talked about a contract, what did you mean?

Was that a Union contract?

**THE WITNESS:** A Union contract, yes.

We did tell him that maybe we could avoid going through this hearing, the hearings, and we told him maybe we could make the settlement out of, you know, out of court, and maybe he would make some kind of an agreement to eliminate all this.

. . . . .

[257] A The previous meeting we had with Mr. McEwan, we had talked to him about a contract, and he told us that—we told him if we could show him a contract, and he says, "Fine, bring it with you the next time you come to see me."

So I think it was the following day we went, and we showed him the contract, and then he looked it over and he [258] told us he did not like some of the things in the contract, that he did not like the pension plan; he did not like the wages, he did not like the holidays.

So we talked to him about, you know, he told us again, he could not, he did not like the contract, and he could not sign the contract. He could not live with it, because there was too much in there for the employees and nothing for the Employer, and we told him that if he did not think he could live with that contract, that maybe he could write on there what he thought he could live with and make notations what he could live with on the wages less than what the amount said on the contract.

And we told him that maybe he should tell us what holidays he could allow on the contract, and we told him that we would go back to the hall and talk to somebody over there, Mr. Sanders or somebody in the hall, and tell them what Mr. McEwan had told us about the contract, and he mentioned again that maybe we can talk to him later again, but he could not do anything himself without Mr. Arruda's—Bill's—Mr. Arruda, I guess, without him being present.

\* \* \*

[281] Q (By Mr. Arruda) Did you discuss—tell us, to the best of your recollection everything that was said, what you said, what Mr. Manuel Vasquez, Sr. said, and what Mr. Moore said during this meeting of March 28, 1968?

A Well, I remember we was—let's see. We was there [282] earlier, I believe, and we asked—well, Mr. Moore was not there, so we went back and we told the lady in the office we would like to talk to Mr. Moore and Mrs. Phillipps. So we went in after we came back the second time, and, why, Arley said, "You want to talk to us?"

And I believe I said, "Yes, we would."

I told Mr. Moore, I says, "We are putting our head up against a brick wall here in this union matter, and we would like to know if you have a solution that can bring it to a head and get us all back to work?"

And we asked Mr. Moore or I asked Mr. Moore if he could talk to the other carriers and see if they could come up with something, that I was sure they were as anxious to get it over with as we were, and I said to Mr. Moore, I says, "Now, I understand that everybody is mad at the union officials here in Santa Maria, and they don't even want to talk to them. If this is the case we can get somebody from out of town from Monterey, Los Angeles or any place to come in and talk and to negotiate a contract,"

\* \* \* well, now, the pension plan in your business contract is one of the best I have ever heard of, but there is other things in it that I just cannot see. He asked if we ever thought about—or forming our own union, and we told him that we did not know anything about these things. We did not even know whether it could be done



or not. That we was open for [283] suggestions, for anything that could be done about this. We told him we was sincere about being there, and if he or Mrs. Phillipps could help us, to come to some sort of an agreement on a contract or something, we would more than appreciate it.

Q Anything else, sir?

A Well, there was talk—they praised one of the boys that worked for them, that is out on strike. That was part of the conversation.

Q Did he not praise you?

A Yes, he did.

Q Dicus and Mr. Manuel Vasquez?

A Yes.

Q As good workers and so forth?

A He certainly did, and I am real proud of it.

Q Will you proceed, sir.

A Yes, sir.

I might mention that Mrs. Phillipps also said, she says, "You boys look a lot better here in the office than you do out on the sidewalks."

She says, "I am real proud of you," and Mr. Moore said practically the same thing. He said that we were missed in the moving business, and he hated to see us not working, and that he would try to talk to the rest of the employers and see if something could be done about the situation. He could only speak for his place. He thought that we would be [284] better off by talking to Mr. McEwan.

Q You had talked to Mr. McEwan that morning?

A Yes.

Q Would you continue, please, in regards to your meeting or conversation with Mr. Moore on March 28, 1968, please.

A Well, I believe I did say something about we hated this thing. It happened—we did want to help McEwan—well, that is about all I can remember, Mr. Arruda.

TRIAL EXAMINER: Did you have a form of the contract there with you?

THE WITNESS: At Mr. Moore's?

TRIAL EXAMINER: Yes.



**TRIAL EXAMINER:** Had you had a form of the contract with you at Mr. McEwan's earlier that day?

**THE WITNESS:** No, sir.

Mr. McEwan asked us to bring a contract in the next day, and he said we would sit down and go over it and see if he could find anything in it that he could live with, and we could live with.

**TRIAL EXAMINER:** Did you get the contract and take it back to him the next day?

**THE WITNESS:** Yes, we did, sir.

\* \* \*

[308]

\* \* \*

**ROBERT L. McEWAN**

was called as a witness by and on behalf of the Respondent, \* \* \*

\* \* \*

[309]

**DIRECT EXAMINATION**

\* \* \*

**Q** By whom are you employed?

**A** International Van Lines.

**Q** In what capacity are you employed?

**A** President.

\* \* \*

[310] **Q** In July of 1967, did you have occasion to buy International Van Lines?

**A** Yes.

**Q** From whom, sir?

**A** From Mr. A. J. Smith.

\* \* \*

[325] **Q** Can you tell us, sir, what happened on October 4, 1967 at your place of business?

**A** Well, I got a call from Chuck Meador.

**Q** Approximately what time did you receive a call from Mr. [326] Meador?

**A** Approximately a quarter to seven. He told me—

**TRIAL EXAMINER:** In the morning?

**THE WITNESS:** Yes.

He told me that we had pickets at our place, and he says, "I wish you would come down right away." You see, I got there about a quarter after seven, so I was dressed at that time. So I just hurried up and came right down, and arriving at my office at seven, five after, right at this point, I went into the office; and I asked Chuck, I said, "Do you know anything?"

And he said, "No."

There were two pickets walking back and forth in front of my office—

Q Do you know who the pickets were?

A I do not.

Q Was there anyone else there in front of your office?

A There were five men, five across the street where they parked their cars.

Q Who were these five men? Do you know?

A There was Richard Dicus, Manuel Vasquez, Sal Casillas, Robert Allen, and I don't know this fifth man.

Q You do not know this fifth man?

A Right.

Q Was the fifth man Robert Vasquez—

A No.

[327] Q —who testified here yesterday, sir?

A No.

Q What was said? What did you do when you approached the men?

A I walked across through the picket line, across the street and went up to the men.

I told them, I said, "We have a job to do. Are you going to go to work?"

And they said, "No, we don't have a contract. We cannot cross the picket line."

And I said, "I don't see how I can sign a contract if I don't have one," and they says, "Do you want us to get you one?"

And I said, "Not at this time," and with that, I walked back into my office.

Q What else happened right after that? Can you tell us? Did anything happen after that?

A About 20 after 7:00 I was standing in Mr. Meador's office debating on what I was going to do with this Federal Electric job, and I was looking out, and I seen

Robert Vasquez's car coming down the road. He came down as far as the middle of the building, turned around and went back.

Q How do you know it was Robert Vasquez?

A I seen him in this windshield. He was close enough to see who was driving.

Q What type of car was he driving?

[328] A A red El Camino Chevy.

Q Did Mr. Vasquez get out of his car at any time?

A No, he never stopped his car.

Q When I say, "Vasquez," I am referring to Robert Vasquez. Did Robert get out of his car at any time?

A No, he never stopped his car to get out.

Q Were the five men that you have identified above, there when Robert Vasquez came down to his car and turned around?

A No, they had left.

Q What did you do next, sir?

A I had to wait until eight o'clock to call Federal Electric and postpone this office move. I did not have the men.

Q When did you postpone it?

A In the meantime I tried to call around to see if I could find any men. I could not, but at eight o'clock I called a Mr. Dorsey Castle at Federal Electric and stated that the situation, that we had pickets. They had put up a strike against us, and that my men would not go to work, and I was wondering if we could get the job postponed, if I could find men that morning.

And he said, "Yes, call me back."

And I turned around and tried to call Mr. Meador, tried to call Unemployment. We tried every place to get qualified men to do this job.

[329] Q You did this on October 4?

A Yes. We could not find help.

I called Mr. Castle back, and I told him this, and he said, "All right, do you think you can get help for tomorrow?"

I said, "I think so. I am not sure. I will have to work on it, so we will postpone it until tomorrow."

Q Which was October 5?

A October 5.

Q 1967?

A 1967.

And with that, he said, "Call me back in the afternoon if you can work out something."

And I said, "All right."

And with that, I went ahead and still called around trying to locate men.

In the afternoon I called my brother down in Oxnard who is president of Mercury Van & Storage.

Q What is your brother's full name?

A John R. McEwan, Jr.

Q What did you ask or tell your brother, and what did your brother tell you?

A I told him the situation, and I said, "I am going to have to get some help, and I cannot find it up here."

And he said, "Well, I am slow down here, and I am planning to lay off three or four men. Maybe they would work," [330] and I said, "Will you ask them if they would work for me, would go to work for me seeing that you are laying them off, because you are slow."

And he said, "Yes, I will call you back."

And, later on in the afternoon he did call me back and told me that three of these men had agreed to go to work, and I said, "Well, I need more than that."

And he said, "I will check around and see if I can find more men through the companies in this area and for casual help or employees, and I will call you back in awhile."

He did this, and he did call me back, and with this, we come up with a crew to do the job the next day.

Q All this occurred then on October 4, 1967?

A Right.

Q Do I understand you correctly?

A Yes.

Q What did you then do, sir?

A I called Mr. Castle and told him that we would be able to do the move at eight o'clock on October 5.

Q Were these five men put on your payroll and when were they put on your payroll?

A They were actually put on my payroll for the fifth, but these men were working out of the Oxnard office

to the point that they were being laid off down there—their pay period ends on Thursday evening. Our pay period ends on Wednesday [331] evening, and the reason for this is we send our timecards to Oxnard, and they in turn send them back to us. To get them back by Friday we have to have them in the mail by Wednesday, so we were working these men—they did not get done until 6:30 on October 5. So in this, when it was getting late, past five, I called my brother and told him, I says, "Go ahead and pay these men, and I will remember—and I will reimburse you out of International so that they can get paid for this day, because we cannot get our timecards down there and get them checked. It is impossible."

Q On October 5, 1967, did you take any action or cause any action to be instituted against your former employees that refused to cross the picket line?

A Yes.

I sent wires out. I waited until 10:30 hoping something could be done on this situation in the morning. I waited until 10:30 in the morning, and then I sent the wires they were being permanently replaced because it has been our policy, of course, in the past that if a man did not show up for work why, he was let go. Not for one day, but for two.

Q On October 12, sir, 1967, were you in your office?

A No. It is an impossibility.

Q Did you discuss or have a discussion with Sal Cassillas on that day?

A No. This would be an impossibility.

[332] Q Why do you say it was an impossibility?

A Because I was under drugs, and I was not coherent.

\* \* \*

MR. ARRUDA: Your Honor, the parties are prepared to stipulate that Robert L. McEwan, the person who is now testifying was admitted into the Valley Community Hospital here in Santa Maria on October 8, 1967, and he was discharged from the hospital on October 28, 1967.

\* \* \*

[333] Q Did Mr. Vasquez, Manuel Vasquez, Sr. visit you at any time thereafter when you were still confined in the hospital?

A I don't remember if he did.

Q Did Mr. Richard Dicus visit you at the hospital after the two weeks?

A Yes.

Q Do you recall, you, conversing with Mr. Dicus?

A Yes.

Q Can you tell us what was said during this discussion?

A Well, he asked me about how I felt, if they could bring me anything. I told them, no, I did not need anything; that I had everything I wanted in there, and he also said, "Well, I hope that when you get out of here we can get this union situation cleared up so we can go back to work."

And I told him at that time I did not know, because I had [334] been away from the job. I was sick, you know. I did not have no recollection of what was going on.

Q In fact, was this conversation after a very, very serious operation?

A Yes.

Q You were still under heavy sedation?

A I was still under—

Q Heavy sedation?

A Yes.

Q Did he visit you any time thereafter, and during your stay in the hospital?

A Yes.

Q Do you recall any further discussions you had with him?

A Here again, he come in with his wife, stayed, you know, asked how I was feeling. This was the last week I was in the hospital, and I told him that I was doing pretty good, that I still had pain; I was still not getting much sleep or eating.

Q Who was running your operation or, rather, your plant operation during your stay in the hospital?

A My father.

Q This was during the month of October?

A Yes.

Q After your discharge from the hospital, where did you go, and what did you do?



A I went down to Oxnard, California to stay with my mother [335] for six days for recuperation.

Q Did you come back to Santa Maria and what date did you come back?

A I came back to Santa Maria on Friday, the 3rd of November, because I had a doctor's appointment on that day, with my doctor in Santa Maria.

Q Mr. McEwan, you heard testimony that you have a son, Robert McEwan.

Is that Robert G?

A John G.

Q John G. McEwan, Jr.?

A No.

John G. McEwan; there is no Jr.

Q And that he was employed by you during the summer months?

A This is correct.

Q Was he paid on an hourly wage rate?

A Yes.

Q How did you consider this gentleman?

A He was just a helper, just like anybody else.

Q Did he have any supervisory status?

A No.

\* \* \*

[338] MR. ARRUDA: That is a copy.

TRIAL EXAMINER: Mr. McEwan, I show you what purports to be the Petition in Case Number 31-RC-666, and I ask you if you received a copy of that paper from the National Labor Relations Board in the mail?

I am sure you have.

[339] THE WITNESS: Yes.

TRIAL EXAMINER: And we have stipulated here it was filed on September 21, 1967 and received by you on September 25, 1967. That has been stipulated by counsel.

Now, did you ever receive any other written communication from Teamsters Local 381 that it represented a majority of your employees and that it wanted you to recognize it as the exclusive bargaining agent for your employees and wanted to bargain with you for those employees?

THE WITNESS: No.



**TRIAL EXAMINER:** I asked you about a written communication.

Was there any time when any of the officials of Local 381 came to you at your place of business, home or any place else and told you that they represented your employees and wanted to bargain with you on behalf of those employees?

**THE WITNESS:** No.

**TRIAL EXAMINER:** You have told us on the date of October 5, when you went to your place of business, you found that there was a picket of the union, Local 381, out in front of your place of business; is that correct?

**THE WITNESS:** It was October 4.

**TRIAL EXAMINER:** On October 4.

**MR. ARRUDA:** That is what I was going to say just now, Your Honor.

[340] **TRIAL EXAMINER:** This is correct.

Prior to that time was any notice given to you by the union that it would picket you as of a certain time because of any particular reason?

**THE WITNESS:** No. I have not received in writing or verbal.

**TRIAL EXAMINER:** Have you ever been informed by the union, Local 381, what you must do in order to have Local 381 remove the picket from in front of your place of business?

. . . . .

[341] **TRIAL EXAMINER:** Then there was one other question I wanted to ask you, and that had to do with this contract.

You heard the testimony of one of the men here today that in a certain meeting with you they produced a copy of the union contract.

**THE WITNESS:** Yes.

**TRIAL EXAMINER:** And presented it to you.

**THE WITNESS:** Yes, I heard this.

**TRIAL EXAMINER:** Now, where is the copy of the contract?

**MR. ARRUDA:** Here.

**TRIAL EXAMINER:** Let the record show that Mr. Arruda just handed me this and now, is that the copy of the contract which was left with you by one of the former witnesses?

**THE WITNESS:** Yes. This is the copy of the contract.

**TRIAL EXAMINER:** Do you recollect the date that you talked with him and he left that with you?

**THE WITNESS:** September 29—Excuse me.  
March 29, 1968.

**TRIAL EXAMINER:** And on the occasion that it was left with you, was it two of your former employees who called on you or one?

**THE WITNESS:** Two.

[342] **TRIAL EXAMINER:** That was Mr. Dicus and Mr. Vasquez?

**THE WITNESS:** This is correct.

**TRIAL EXAMINER:** I think a copy of that contract was to go into evidence, too, and again, I will say this: if you do not want to put it in, I will put it in.

**MR. ARRUDA:** Respondent will introduce as Respondent's Exhibit Number 3, the contract.

**Q (By Mr. Arruda)** That was a copy of the contract that was handed to you, Mr. McEwan, on March 29?

**A** Yes.

**MR. ARRUDA:** I ask leave, Your Honor, to submit the photostatic copies.

**TRIAL EXAMINER:** Yes.

I will give you leave to withdraw it.

Perhaps the Union has another copy, and they will supply it to you.

**MR. ARRUDA:** May the record show that I am handing Mr. Sanders of Local 381, secretary-treasurer, these exhibits, and he has graciously agreed to make copies for me, and I will have these available, I believe.

**TRIAL EXAMINER:** They have been offered in evidence by Mr. Arruda, and is there any objection to their receipt in evidence?

**MRS. ROBBINS:** No objection.

**TRIAL EXAMINER:** There being no objection to the receipt [343] in evidence, Respondent's Exhibit Number

8 is received in evidence and marked as Respondent's Exhibit Number 3.

. . . . .

### CROSS-EXAMINATION

Q (By Mrs. Robbins) After October 4, 1967, Mr. McEwan, did you ever have any discussion with Mr. Sal Casillas about his paycheck?

A Not about his paycheck, no.

Q Did you have a discussion with him about anything?

A Yes.

I had a discussion with him about—he come to the office and—

Q When was this?

A This was in the latter part of November.

[344] Q As nearly as you can recall, what was said?

A What was said?

Q Yes.

A I did not hear you. I am sorry.

What was said?

Q Right.

A He come in and told me he could not stay out on strike any more, that these other men had wives working, that he did not have a wife working and that he had to go back to work and he asked if he could be put on an availability list of my company.

Q Did you say anything?

A Yes.

I told him, yes, that I would put him down as jobs come in, that we could use him on things, and, why, we would call him.

Q As I understand it, then, have you called Mr. Casillas?

A No, I have not had occasion to.

Q This was the latter part of November?

A Yes.

. . . . .

[348] Q Would you tell me the names of the five people that your brother recommended come down from Oxnard?

A Harold Mitchell.

Q Harold Mitchell?

A Yes.

There was Gary Hoffman.

There was—I can't remember this man's last name.

Q What is his first name?

[349] A Blaine, B-l-a-i-n-e.

Q Who were the other two, and we will see if we can find the last name.

A Well, one man—well, these are the only ones I got from my brother, but he contacted and got the other men from other companies.

Q Yes?

A Right offhand I can't remember their names. I just cannot.

Q Was that Blaine Burlington?

A Yes.

TRIAL EXAMINER: Will it refresh his recollection regarding who these men were if you had a look at the payroll for that period?

THE WITNESS: Yes, it is possible, sir.

TRIAL EXAMINER: It is impossible or possible?

THE WITNESS: It is possible.

MRS. ROBBINS: I have a few questions I can ask him that may be helpful.

Q (By Mrs. Robbins) Was it James Pilkington?

A No. He was a local man.

Q What about Ron Mengus? M-e-n-g-u-s.

A Mengus was a local man.

MR. ARRUDA: I think that is M-e-n-g-u-s. I do not intend to interfere.

MRS. ROBBINS: I think I can refresh his memory, Mr. [350] Arruda.

Q (By Mrs. Robbins) Was Dean Matthews one?

A No. This man was—if I can remember, and here again I think this man was brought up from San Diego. He come up here, and we put him to work.

Q What about Kenneth Lally, L-a-l-l-y, was he one?

A This one I don't even remember.

Q Robert Campbell, was he one?

A This I can't tell you.

No, as far as I know.

Q Tommy Thompson?

A No.

Tommy Thompson is a local man.

Q Welby Murray?

A I don't know about this man, no.

Q Harold Rendon?

A No, I cannot say this man either.

Q Alexander Camillo?

A I don't know.

Q Al Macey?

A No.

I can't remember these names you are talking about on these men except for the ones I have named.

Q Ysmael Contreras, Y-s-m-a-e-l?

A This is one of the men, yes. He works for another company [351] in Oxnard. We call him Easy.

\* \* \*

[397]

### ROBERT McEWAN

was recalled as a witness and, having been previously sworn, was examined and testified further as follows:

TRIAL EXAMINER: As I told you, Mr. McEwan, if you are uncomfortable at any time due to your illness, just let me know and I will give you a little chance to step out.

THE WITNESS: Thank you.

TRIAL EXAMINER: Go ahead.

### DIRECT EXAMINATION

Q (By Mrs. Robbins) Mr. McEwan, how soon after you were released from the hospital did you start going back to your office?

A It was better than a week. I went down to Oxnard for a week.

Q All right.

And I believe it was the latter part of October that you were released from the hospital?

A The 28th of October.

Q Directing your attention to November of 1967, did you have any conversation with a Jim Smith from the Teamsters [398] Joint Council?

A Yes.

Mr. Smith was in to talk to me.

Q All right.

Where did this conversation take place?

A In my office.

Q Was anyone else present?

A Mr. Vasquez.

Q Is that Manuel Vasquez, Sr.?

A Yes.

Q As nearly as you can recall—let's see if we can place the date closer than a month.

A I don't remember.

As far as I remember, it would be the latter part of November, but I don't recall the date. I have no idea.

Q All right.

As near as you can recall, what was said in this conversation, Mr. McEwan?

A As nearly as I can recall, Mr. Smith said he would like to talk. He said that he had come in from the International Union and that he had to go back with a report to the International as to what progress and what things were happening in this area; and that he could make out a contract above and beyond the Local Union.

Q And what else was said?

[399] A I don't know.

Q Did you not say anything at all, Mr. McEwan?

A I told Mr. Smith, at that time, I was not physically or mentally well enough to really discuss anything about it.

. . . . .

[405]

# MANUEL VASQUEZ

was called as a witness in rebuttal by and on behalf of the General Counsel and, having been previously sworn, was examined and testified as follows:

. . . . .

[406] Q Mr. Vasquez, directing your attention to November of 1967, did you and Mr. James Smith have a conversation with Mr. Robert McEwan?

A Yes, we did.

\* \* \*

A Me and Mr. Jim Smith and Mr. Frank Vasquez walked into Mr. McEwan's office, and I introduced Mr. Smith to Mr. Bob McEwan. Then Mr. Smith told him who he was and what he was [407] there for.

Q What did he say?

A Mr. Smith told Mr. McEwan that he was there to see if we couldn't reach some kind of settlement with the strike, and see if we could sign a contract. He told them that he knew that the majority of the employees had signed authorization cards. Mr. McEwan told him that; that he wasn't feeling too good; that he was feeling not up to par; that he didn't think he could do anything at that time.

Q Do you recall anything else that was said, Mr. Vasquez?

A No.

\* \* \*

[410]

### FRANK VASQUEZ

was called as a witness in rebuttal by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

\* \* \*

[411] Q (By Mrs. Robbins) Mr. Vasquez, are you the same Frank Vasquez that had a conversation with Mr. Robert McEwan and Mr. Jim Smith and Mannie Vasquez, Sr. in November?

A Yes, I am.

Q Do you recall the date of that conversation?

A I don't recall the exact date, but during the conversation—I don't know the dates—Mr. McEwan mentioned that he was recuperating from major surgery. I imagine it was within a week or ten days after he left the hospital.



**Q** All right.

As nearly as you can recall, would you tell us what was said during this conversation?

**A** Well, Mr. Manuel introduced Mr. Smith.

**Q** Well, what did he say?

**A** Well, he walked in and shook hands and said hello. Mannie said, "I would like to introduce Mr. Jim Smith who is from the International."

Then Mr. Smith introduced himself.

[412] **Q** Do you recall what he said?

**A** Mr. Smith said that he was from the Joint Council and that he had come in to sit down and talk with Mr. McEwan and try to get a settlement on this strike.

Mr. McEwan answered that he wasn't feeling very well and that he wasn't in any condition to talk about the activities—well, the labor strike. Then Mr. Smith told him that he wouldn't keep him very long; that he had come in prepared to sit down and make a settlement that would be something that maybe Mr. McEwan might be able to agree to.

Mr. McEwan then answered that he didn't think that he would be able to live with any type of a union contract. That was about all of the conversation that I can recall.

**Q** Was anything said about authorization cards?

**A** Yes.

Just at the start of the conversation, Mr. Smith told Mr. McEwan that the men that were working there had a majority of cards signed. I don't recall what Mr. McEwan answered to that.

\* \* \*

[413] **A** He told me that—well, he told Mr. Manuel Vasquez and I that he had come down to act as sort of an inbetween to see if he could sit down and talk with Mr. McEwan; and see if he could negotiate a contract; and that he had the power to make some kind of a settlement.

\* \* \*

[416] **A** I was at the union hall that day when Mr. Smith came in and I was introduced to him. Mr. Manuel Vasquez asked me if I would like to come along and talk

to some of the employers and see if we couldn't come to some kind of an agreement with them.

. . . . .

[417] MRS. ROBBINS: I would like to have these marked as General Counsel's next in order, A, B, and C.

(The documents above-referred to were marked General Counsel's Exhibit Nos. 10-A, B and C for identification.)

TRIAL EXAMINER: Let the record show that some documents are being marked General Counsel's Exhibit Nos. 10-A, B and C. These are being marked General Counsel's 10-A, B and C.

MRS. ROBBINS: General Counsel will now offer in evidence [418] General Counsel's Exhibit 10-A, B and C.

TRIAL EXAMINER: I would like to have you tell us what General Counsel's 10-A is and what 10-B is.

MRS. ROBBINS: Yes, sir.

Some of the things apply to all of them and I would like to make a statement about that.

General Counsel's 10-A through 10-C gives information taken from Respondent's payroll records which were furnished to General Counsel earlier in the hearing. General Counsel's 10-A is a three-page document, showing hours worked daily by employees of Respondent, beginning during the week ending July 6, 1967, and continuing through the week ending October 11, 1967. There is no information for the first few days of July when Respondent took over the business. Apparently, those timecards were not available.

TRIAL EXAMINER: Well, what does this document show as to the employment of people immediately preceding the time of the strike?

MRS. ROBBINS: It shows who was employed and what days they worked.

General counsel, as I indicated in the beginning—well, there are two things that this document show that are relevant to this hearing. First, it shows when any replacements started working from the payroll records. It further is needed to establish the question of a majority,

since we are asking [419] for a bargaining order, as indicated earlier.

It is General Counsel's position that this is the type of business that requires a formula for determining those eligible to select for bargaining representative. The formula that General Counsel contends is the correct formula depends upon the number of days worked during the peak season. For that reason, this goes into the actual days worked, everyone employed by Respondent during the peak season.

. . . . .

MR. ARRUDA: Your Honor, may I also bring to your attention that on October 5 these replacements were actually put to work. They were paid by Mercury and were carried on Mercury's payroll at Oxnard. That was testified to by Mr. McEwan. They were subsequently paid by—

MRS. ROBBINS: The only thing these records purport to do is show what the payroll records show.

TRIAL EXAMINER: Well, I, of course, would like to find out those that worked immediately prior to the strike and who came to work as replacements immediately after the strike. [420] That is my principle worry about this matter.

MRS. ROBBINS: General Counsel's 10-A will show that, Your Honor, on the third page.

TRIAL EXAMINER: Now, as I look at the last page here, you mention something on the third page of General Counsel's Exhibit No. 10. If you will look at that with me, I want to be sure I understand these documents.

There are figures which indicate that Robert Campbell, Kenneth Lally, Dean Matthews, Ron Mengus, James Pilkington and Tommy Thompson worked some hours after October 5.

. . . . .

MR. ARRUDA: Your Honor, Respondent just informed me that as he testified to, that the three replacements brought [421] down from Oxnard on the 5th were paid by his brother's operation in Oxnard; and that the end of the period, Respondent went ahead and reimbursed his brother.

**TRIAL EXAMINER:** When you talk about replacements—

**MR. ARRUDA:** That is right. He has testified to that.

**TRIAL EXAMINER:** Now, I am talking about replacements and I have heard some names mentioned here and the claims were made that they were replacements. Now, where do the names appear on this payroll record immediately after the strike?

**MRS. ROBBINS:** They don't, Your Honor.

**TRIAL EXAMINER:** Do the names that were mentioned here earlier ever appear on the payroll records?

**MRS. ROBBINS:** Yes, Your Honor, at a later time, they do. On General Counsel's 10-B.

**MR. ARRUDA:** Your Honor, Mr. McEwan testified that Mr. Mitchell, Hoffman, Burlingame and a fellow names Easy, and a fellow names Dan Cross were the replacements.

**TRIAL EXAMINER:** All right.

But they don't appear on GC10-A.

**MRS. ROBBINS:** No.

**TRIAL EXAMINER:** All right.

Go on to your next exhibit.

**MRS. ROBBINS:** General Counsel's 10-B shows the hours worked by Respondent's employees during each week beginning October 11, 1967 and continuing through November 29, 1967, [422] except for the week ending November 22. Respondent did not have available any payroll records. That column is blank. There are two names on the first page of this exhibit that appear, from prior testimony by Mr. McEwan, are the same person. Ishmael Contreras and a person that is identified on the payroll record only as Easy. These appear to be the same person.

The purpose of this exhibit is to show that after Mr. Cassius applied for reinstatement, Respondent did hire new people.

. . . . .

[424] TRIAL EXAMINER: General Counsel's 10-A, consisting of three pages is received in evidence.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 10-A, was received in evidence.)

\* \* \*

[425] MRS. ROBBINS: All right.

General Counsel's 10-B is also taken from Respondent's payroll records and it shows the number of hours worked weekly by the various employees of the Respondent, beginning in the week ending October 11, and continuing through the week ending November 29, with the exception of the week ending November 22, for which Respondent had no payroll records available. That column is blank.

The purpose of this is to show that after Mr. Sal Casius asked for reinstatement, other new employees were hired by Respondent.

\* \* \*

[426] (The document above-referred to, heretofore marked General Counsel's Exhibit 10-B, was received in evidence.)

\* \* \*

[427] MRS. ROBBINS: The stipulation I am proposing is that during the period covered by General Counsel's 10-A, up to October 4, both Mr. Richard Dykus and Manuel Vasquez worked as salaried employees, and they worked regularly every day [428] during this period.

MR. ARRUDA: I will stipulate to that, Your Honor.

TRIAL EXAMINER: All right.

The stipulation is accepted.

MRS. ROBBINS: General Counsel's 10-C is merely a recapitulation of the number of days worked by employees of Respondent as shown on General Counsel's 10-A. That shows the number of days worked as of September 21, 1967, which, I believe, Your Honor had indicated you might consider as a critical date—the date the petition was filed. It also indicates the number of days worked as of October 5, 1967, which, I might urge, as being a critical date.

**TRIAL EXAMINER:** Any objection to the receipt of this document in evidence?

**MR. ARRUDA:** No objection.

The petition for election, I believe, was filed on September 21, 1967, and not on September 27.

**MRS. ROBBINS:** If I said that, it was a mistake. What it shows is September 21.

**TRIAL EXAMINER:** The document is received in evidence.

(The document above-referred to, heretofore marked General Counsel's Exhibit 10-C, was received in evidence.)

. . . .

WESTERN UNION



SYMBOLS
DL - Day Letter
NL - Night Letter
LT - Letter Telegram

# WESTERN UNION TELEGRAM

W. P. MARSHALL  
CHAIRMAN OF THE BOARD

R. W. MARSHALL  
PRESIDENT

The time shown in the line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination.

LDC PD-SANTA MARIA CALIF 9 1157A PDT- 51961 5 11 41  
MANUEL A VASQUEZ

329 NORTH BEN WILEY SANTA MARIA CALIF

FOR FAILURE TO REPORT TO WORK AS DIRECTED AT 7AM ON  
WEDNESDAY OCT 4 1967 YOU ARE BEING PERMANENTLY REPLACED  
INTERNATIONAL VAN LINES

51961 not known



LDOO2 PD=SANTA MARIA CALIF 5 1137A PST=

:MANUEL A VASQUEZ=

329 NORTH BENWILEY SANTA MARIA CALIF=

PROBERT VASQUEZ=

821 SIERRA MADRE SANTA MARIA CALIF=

FRICHARD L DICUS=

715 EAST CAMINO COLEGIO SANTA MARIA CALIF=

FOR FAILURE TO REPORT TO WORK AS DIRECTED AT 7AM ON  
WEDNESDAY OCT 4 1967 YOU ARE BEING PERMANENTLY REPLACED=  
INTERNATIONAL VAN LINES=

110 3

# WESTERN UNION TELEGRAM

W. P. MARSHALL  
CHAIRMAN OF THE BOARD

R. W. McFALL  
PRESIDENT

DAY LETTER	DAY LETTER
NIGHT LETTER	NIGHT LETTER
INTERNATIONAL	INTERNATIONAL
DAY TELEGRAM	DAY TELEGRAM

OF SERVICE  
in its deferred character  
is indicated by the  
symbol.

The time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

LD4 PD=SANTA MARIA CALIF 5 1137A PDT= 1967 OCT 5 AM H 41  
 RICHARD L DICUS= 715 EAST CAMINO COLEGIO SANTA MARIA CALIF=  
 FOR FAILURE TO REPORT TO WORK AS DIRECTED AT 7AM ON  
 WEDNESDAY OCT 4 1967 YOU ARE BEING PERMANENTLY REPLACED=  
 : INTERNATIONAL VAN LINES=

6:00 PM 11:30

5	NC.
5	BY

Authorization for Representation Under the National Labor Relations Act

I, the undersigned employee of

Company: *International Van Lines*

Address of Company: *2756 Lindstrand U. av*  
 authorize TEAMSTERS AND WAREHOUSEMEN LOCAL No. 38 to  
 represent me in negotiations for better wages, hours and working conditions.



(PLEASE PRINT)

Name: *Richard h. Diez* Date: *Aug 23-67*

Home Address: *715 E. Camino Del Rio* CITY AND HOME NO. *San Diego*

Social Security Number: *463-12-1887* Phone: *WA. 50039*

Classification: *Driver* Shift: Day \_\_\_\_\_ Swing \_\_\_\_\_ Graveyard \_\_\_\_\_

Present Wage Rate: *\$4.84/150 per hr*

I UNDERSTAND THIS CARD IS STRICTLY CONFIDENTIAL

Signature: *Richard Diez* C.C.E.

Authorization for Representation Under the National Labor Relations Act  
I, the undersigned employee of



Company: INTERNATIONAL UNION  
Address of Company: 2136 Industrial Way  
authorizing TEAMSTERS AND WAREHOUSEMEN LOCAL No. 381 to  
represent me in negotiations for better wages, hours and working conditions.

(PLEASE PRINT)

Name Robert Vazquez Date 8/22/67  
Home Address 221 E. Sierra Madre San Antonio, TX  
CITY AND ZONE NO.  
Social Security Number 517-20-4287 Phone 56055  
Classification RUC-Drummer Package Shift: Day X Swing Graveyard  
Present Wage Rate \$2.75

I UNDERSTAND THIS CARD IS STRICTLY CONFIDENTIAL

Signature Robert Vazquez

## GENERAL COUNSEL'S EXHIBIT No. 7

Authorization for Representation Under the National Labor Relations Act  
 I, the undersigned employee of

Company INTERNATIONAL VAN LINES

Address of Company 2756 Industrial Way  
 authorize TEAMSTERS AND WAREHOUSEMEN LOCAL No. 381 to  
 represent me in negotiations for better wages, hours and working conditions.



(PLEASE PRINT)

Name Manuel A. Vasquez Date Aug. 23, 1967

Home Address 329 N. Ben Wiley Santa Maria  
 NUMBER AND STREET CITY AND STATE

Social Security Number 562-24-8081 Phone 5-7861  
 GRAVEYARD

Classification WAREHOUSE MAN Shift: Day X Sw

Present Wage Rate \$15.00 WEEKLY

I UNDERSTAND THIS CARD IS STRICTLY CONFIDENTIAL

Signature Manuel A. Vasquez  
G.C. 7

ED-3

Authorization for Representation Under the National Labor Relations Act  
I, the undersigned employee of



Company: International Van Lines  
Address of Company: 2756 Industrial way  
authorize TEAMSTERS AND WAREHOUSEMEN LOCAL No. 381 to  
represent me in negotiations for better wages, hours and working conditions.  
(PLEASE PRINT)

Name Daniel Davis Date Aug. 23, 1960  
Home Address Box 916 Cal Poly CITY AND ZONE NO. INDO  
Social Security Number 529-72-5473 Phone 543-4472  
Classification Helper - Packing Shift: Day ☒ Swing ☐ Graveyard ☐  
Present Wage Rate \$1.50

I UNDERSTAND THIS CARD IS STRICTLY CONFIDENTIAL

Signature Daniel Davis  
G. C. 8

Authorization for Representation Under the National Labor Relations Act  
I, the undersigned employee of

Company: INTERNATIONAL VAN LINES INC.

Address of Company: 2756 JARDIN DE FRANCE AVE. S.W.  
authorize TEAMSTERS AND WAREHOUSEMEN LOCAL No. 381 to  
represent me in negotiations for better wages, hours and working conditions.

(PLEASE PRINT)

Name: DAVID PONCELT Date: 9/1/61

Home Address: 519 W. PETERS Santa Monica Calif.  
NUMBER AND STREET CITY AND ZONE NO.

Social Security Number: 541-66-3201 Phone: 552-64

Classification: \_\_\_\_\_ Shift: Day ☒ Swing \_\_\_\_\_ Graveyard \_\_\_\_\_

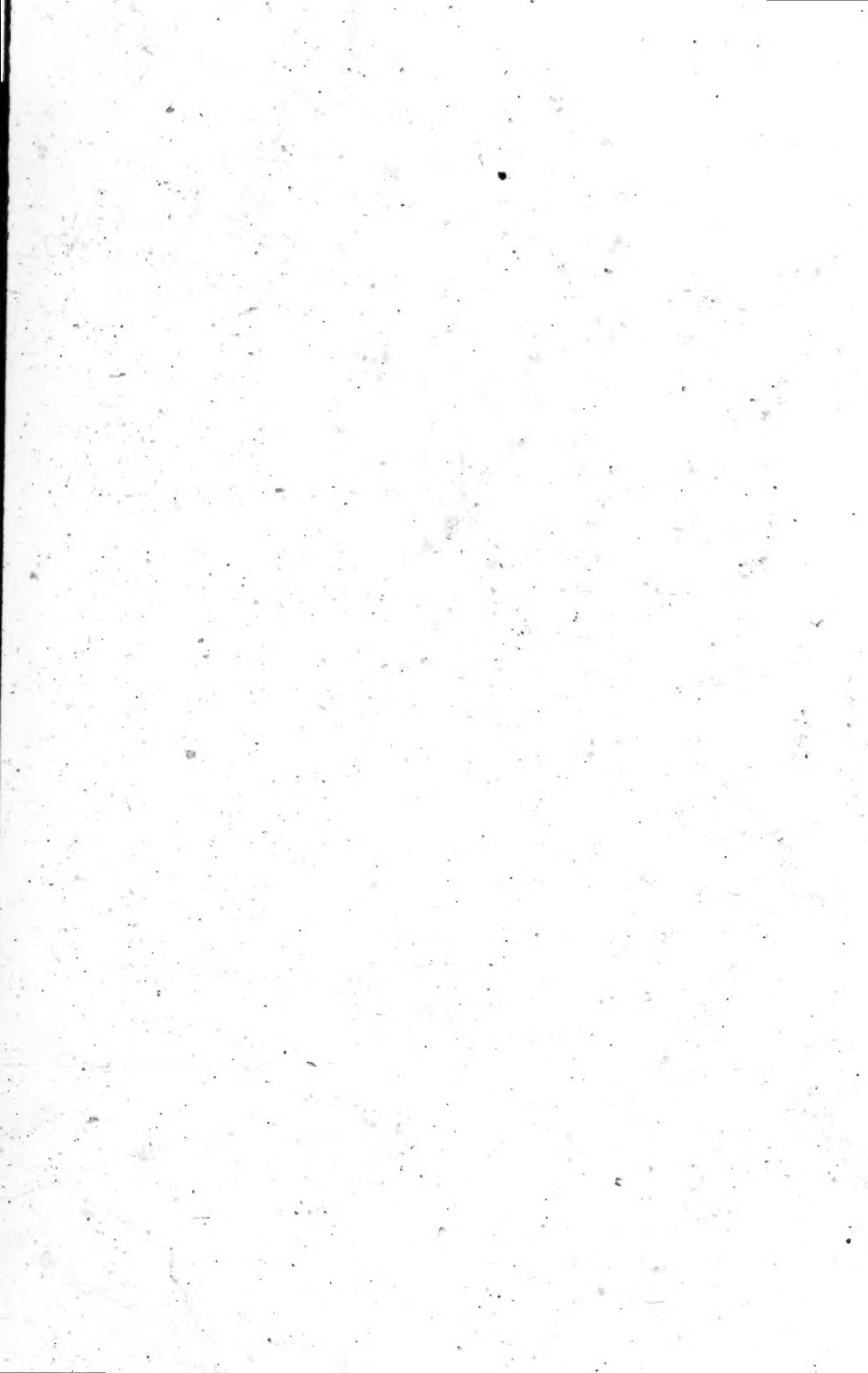
Present Wage Rate: \$2.50

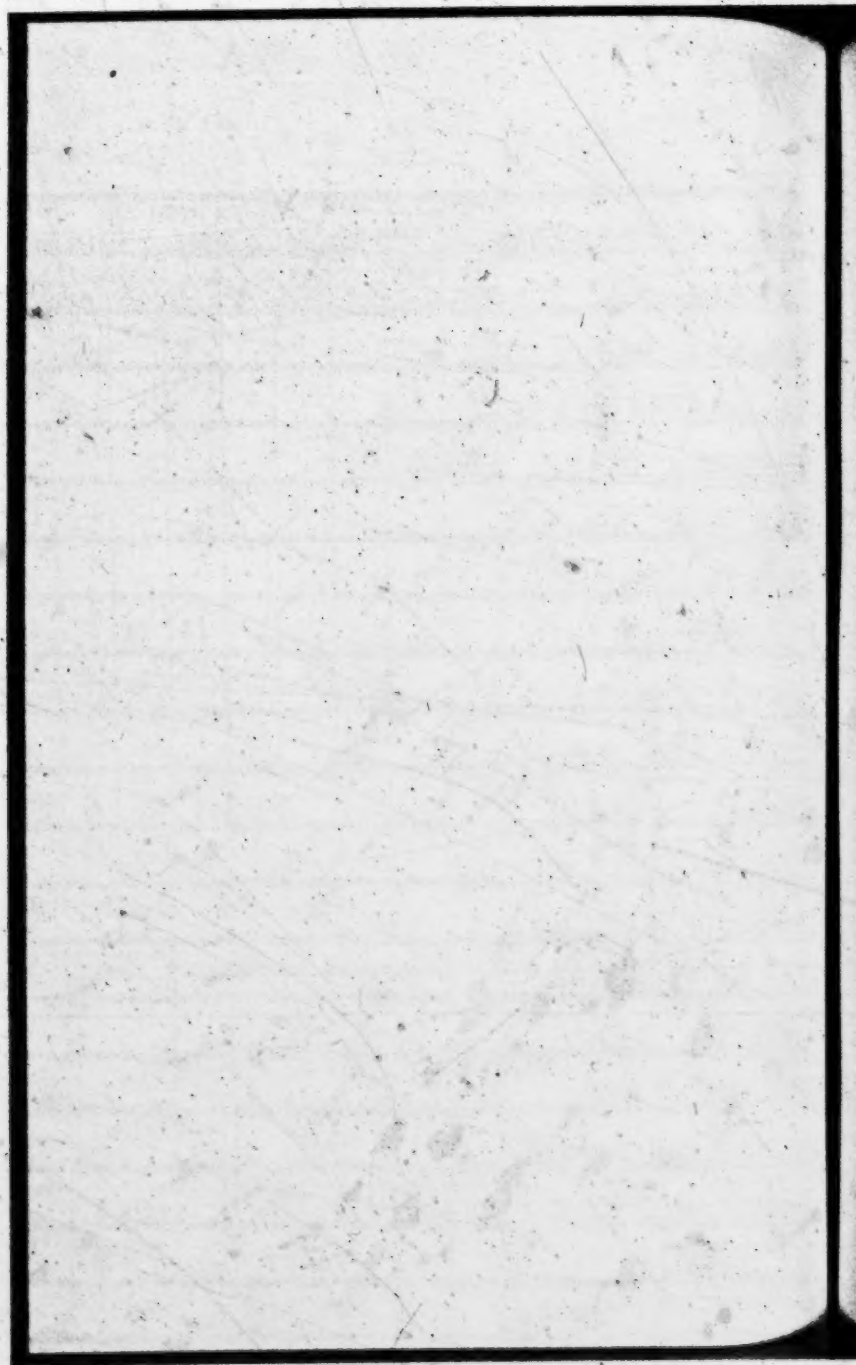
I UNDERSTAND THIS CARD IS STRICTLY CONFIDENTIAL

Signature: David Poncelet  
G.C. 9









[158] THE WITNESS: Well, we were told at this meeting, October 3, that International Van Lines, Bear Van Lines, and that is B-e-a-r, and Valley had withdrawn their consent for an election, and everybody was in an uproar; and we just decided, well, they don't want to consent to an election. We are going to go on strike, and we all started making up picket signs that night. And the next morning we went on strike.

TRIAL EXAMINER: Did you see the picket signs out there? Did you see them?

THE WITNESS: Right.

TRIAL EXAMINER: What is your recollection of what the picket signs said?

THE WITNESS: It said, "Unfair To Teamsters 381, No Election. Why?"

\* \* \*

Q (By Mr. Robbins) Following October 4, 1967, did you have a conversation with any of the McEwans regarding the union or the strike or getting your job back?

A Yes, I did. I had a conversation with Mr. Bob McEwan.

Q When was this?

A I think it is some place—let's see. Some time in [159] October, the 12th, I think. I am not going to swear. Some time in October, the first meeting.

Q But this was after October 4?

A That is correct.

Q Where did the conversation take place?

A In his office; in the front office, I should say.

Q Was anyone else present?

A No, there was not.

Q As nearly as you can recall, what was said?

A Well, we talked about the—I went to ask for a job and he—no—first of all, what happened, I went to get my check, you see.

They had made a mistake. He owed me some time and a half, and he said, "Well, I will take care of it as soon as possible," and I asked him what he thought about this union strike.

He did not think much of it, just he was a nervous wreck. He had to have some shots of some kind. He was

pretty sick, and I asked him why you—why he would not sign the contract, union contract.

He says, "Well, those kind of hoodlums in Teamsters 381," he says, "I won't sign anything, you know." And this is regular shop talk.

. . . .

[161]

### CROSS-EXAMINATION

. . . .

[165] Q You testified that you heard a conversation between Mr. McEwan and Mr. Dicus and a few employees about signing an agreement or contract, and, "Hell, no, he would not sign a contract."

. . . .

[174] Q (By Mr. Arruda) Did you receive a telegram from the company telling you you would be replaced?

A No, I did not.

. . . .

[175]

### MANUEL VASQUEZ

was called as a witness by and on behalf of the General Counsel . . .

. . . .

### DIRECT EXAMINATION

. . . .

[176] Q You are the same Manuel Vasquez that worked for International Van Lines and signed a union authorization card?

A Yes, I am.

. . . .

[182] Q Did you go out on strike on October 4, Mr. Vasquez, in 1967?

A I don't know what you mean. I went out on strike. I reported for work.

Q Did you work?

A No, I did not.

Q Was the picket line up when you reported to work?

A Yes, it was.

Q And you did not cross the picket line?

A That's right.

Q You still have not crossed the picket line?

A That's right.

Q You are the Manuel Vasquez, Senior, that received a telegram from International Van Lines on October 5?

A Yes, I was—I am.

Q Did there come a time when you asked to have your job [183] back with International Van Lines?

A On October 12 I went back to ask for my job—I mean on December 12 I went back and asked for my job back.

Q Whom did you ask?

A Mr. McEwan.

Q That is Robert McEwan?

A Robert McEwan.

Q Where did this conversation take place?

A In his office.

Q Who was present?

A Mr. Richard Dicus.

MR. ARRUDA: To expedite this matter—

TRIAL EXAMINER: Just a minute now, please.

MR. ARRUDA: Respondent will stipulate as to the conversation had with Mr. McEwan on December 12 with Richard Dicus and Robert Vasquez as the same that would be testified—that has been testified to by Robert and Richard Dicus.

MRS. ROBBINS: Let me just ask Mr. Vasquez this:—

TRIAL EXAMINER: In the previous stipulation, wasn't this the stipulation extended to three individuals who had testified to this?

MR. ARRUDA: That is what I am stipulating to now, sir.

TRIAL EXAMINER: Yes. Well, I thought you named just two now.

MR. ARRUDA: Manuel Vasquez, Robert Vasquez and Richard [184] Dicus. I understand from their testimony that they appeared at the Respondent's place of business on December 12 and asked to be reinstated.

TRIAL EXAMINER: All right. Good.

Q (By Mrs. Robbins) Mr. Vasquez, you heard the testimony of Mr. Richard Dicus and Mr. Robert Vasquez?

A Yes, I did.

Q Did you not?

A Yes.

Q Would your testimony differ in any respect from their testimony as to the conversation with Mr. McEwan on December 12?

A No. It is about the same.

TRIAL EXAMINER: The stipulation as to the remainder of the testimony of this conversation of this witness is accepted.

Q (By Mrs. Robbins) Had you had another conversation with Mr. McEwan between October 4 and December 12?

A I went to see Mr. Robert McEwan at the hospital. I just don't recall the exact date.

Q Do you recall what month it was?

A I think it was about October 20, or something like that.

Q Was anyone else present?

A No, there was not.

Q As nearly as you can recall, what did you say to Mr. McEwan, and what did he say to you?

[185] A Mr. McEwan was in the hospital, in the Valley Community Hospital, and I went to see him. It was on a Sunday, and I went in there and told him that me and the boys had talked about going back to work, and we would like to know how he felt about it.

He told us that—he told me that he was not in a position at the time to talk about going back to work, and that after he got a little better we could talk, that his door would always be open any time we wanted to talk about it.

Q Did you attend the various union meetings in August, September and October, Mr. Vasquez?

A Yes, I did.

[210] MRS. ROBBINS: Counsel for Respondent and I have agreed upon two stipulations.

One, that International Van Lines is a corporation owned by two brothers, Robert McEwan and John R. Mc-

Ewan, Jr. Robert McEwan owns 30% of outstanding stock in the company.

John R. McEwan, Jr. owns 70% of the outstanding stock in the company.

The president of the company is Robert McEwan.

The vice-president is John R. McEwan, Jr.

The secretary-treasurer is Harold Dikes, D-i-k-e-s, and, Mr. Arruda, is it true that Mr. John McEwan does not daily participate in the operations of the business?

MR. ARRUDA: No, he does not.

MRS. ROBBINS: All right.

And that John McEwan does not participate in the day-to-day operations of the business.

\* \* \*

[211] MRS. ROBBINS: A second stipulation has to do with the wording of the picket signs at International Van Lines.

The signs are large cardboard affairs that have been printed on them "Unfair to Teamsters Local 381."

Now, some of the signs only have this printed matter that appears on all of the Union's picket signs. Others also have [212] handwritten or hand-printed in addition to the "Unfair to Teamsters Local 381," the following wording.

One, "No elections. Why?"

Another picket sign, "No Contract."

Another sign, "Big Money For Attorneys. Nothing For Us."

TRIAL EXAMINER: It is so stipulated, Mr. Arruda?

MR. ARRUDA: So stipulated, Your Honor.

TRIAL EXAMINER: The stipulation is accepted.

\* \* \*

[240]

MANUEL VASQUEZ

was recalled as a witness by and on behalf of the Respondent, and, having been previously duly sworn, resumed the stand and testified further as follows:

\* \* \*



# DIRECT EXAMINATION

[241] Q Mr. Vasquez, did you and Mr. Richard Dicus on March 28, 1968, at approximately 2:00 p.m. in the afternoon meet with Mr. Arley Moore, son of Wilmer Moore of Valley Van & Storage?

A We did.

Q You did?

[248] THE WITNESS: The reason we went to see Mr. Moore, we were trying to get the strike settled and see if we could get a contract signed so that we could all go back to work.

# CROSS-EXAMINATION

THE WITNESS: We went to Mr. Moore's office, and we told him that we were there to see if we could get this strike [249] settled and contract signed, and we told him that we had been to see McEwan at his office. We had been there for the same purpose as we were for Mr. Moore, and that we were fed up with this strike and everybody has been out of work and we all wanted to go back to work, and we asked Mr. McEwan—we went over to his office, if he would sign a contract and put us all back to work, and we told him that there was no—we did not think there was any reason why we could not sit down and talk about it, and try to make a settlement of some kind.

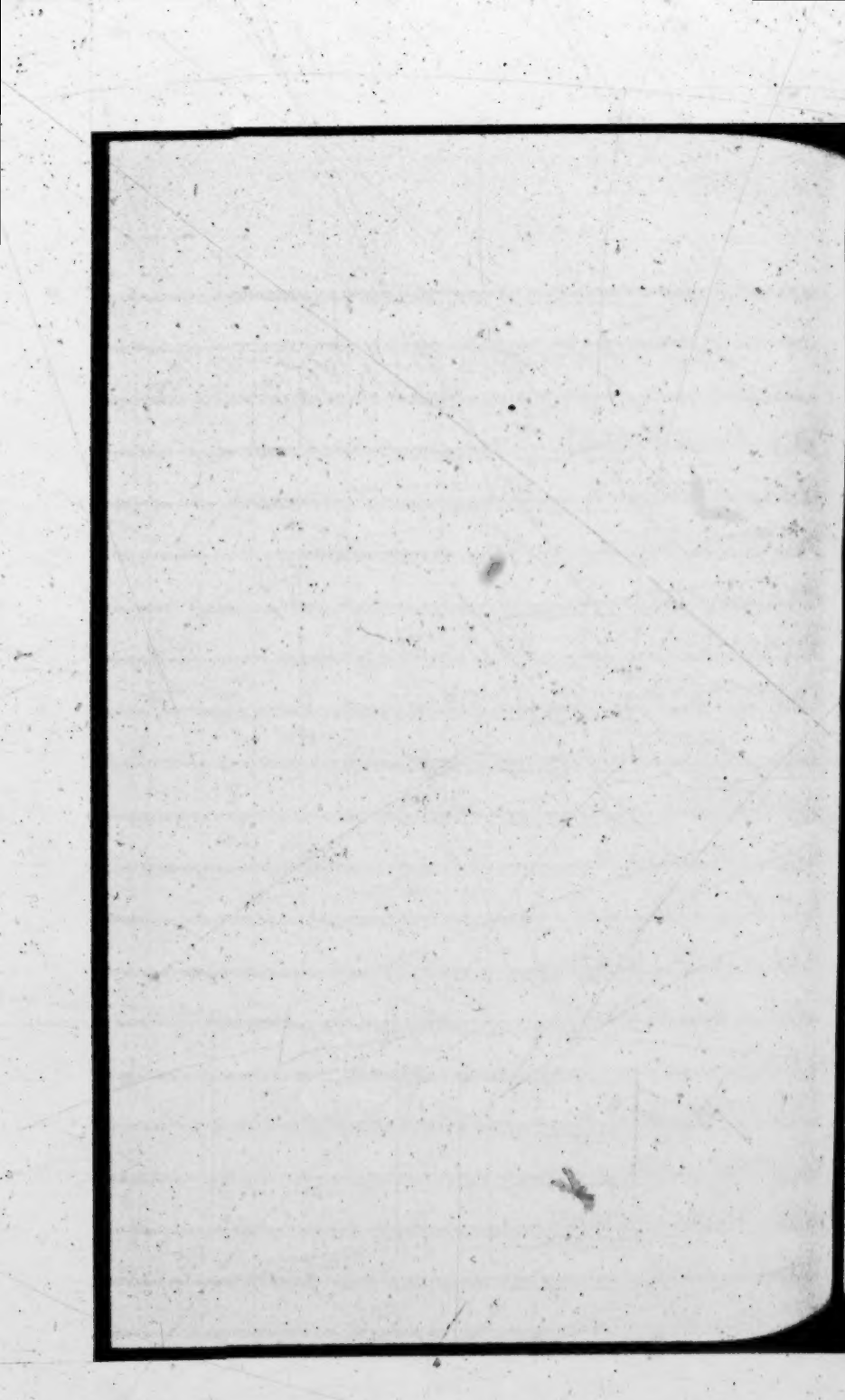
[251] TRIAL EXAMINER: And you asked him about settling this strike and signing the contract?

THE WITNESS: Yes.

[252] THE WITNESS: We went to Mr. Moore's office, and we told him that we wanted to have this strike settled and that maybe we could sign a contract and get the strike over with.

He said maybe we could sign a contract and get the strike over with and all of us come back to work, and

	10/11	10/10	8/25	11/1	11/8	11/15	11/20	11/30	
CAMPBELL, ROBERT	8 $\frac{1}{4}$								
LALLY, KENNETH	25 $\frac{1}{4}$								
MATTHEWS, DEAN	23 $\frac{1}{4}$								
GENEUS, RON	9 $\frac{1}{2}$								
PILKINGTON, JAMES	10 $\frac{1}{2}$	51 $\frac{1}{2}$	35 $\frac{1}{2}$					40 $\frac{1}{2}$	
THOMPSON, TOMMY	50 $\frac{1}{2}$	24 $\frac{1}{2}$	7 $\frac{1}{2}$					17 $\frac{1}{4}$	
CONTRERAS, YSMAEL	35								
BARRY, WELBY	20 $\frac{3}{4}$								
PILKINGTON, JIM	51 $\frac{1}{2}$			51	47 $\frac{1}{2}$	51			
RINDON, HAROLD	11	8 $\frac{3}{4}$							
BURLINGTON, BLAINE		29 $\frac{1}{2}$							
QUILLO, ALEXANDER		9 $\frac{1}{2}$							
FRAY		21 $\frac{1}{2}$							
HOFERMAN, GARY		21 $\frac{3}{4}$	47	64	40 $\frac{3}{4}$			35	
MARTIN, AL		7 $\frac{1}{2}$							
DELL, GARY (from VAN DYKE)		8							
SALEN, BOB				17	44 $\frac{1}{4}$	45		35 $\frac{3}{4}$	
PIERCE, ED				32 $\frac{1}{4}$					



SWAYZE, BOB

WHEELER, FRED

BREKE, RONALD

CLARK, JODY

1/1 1/8 1/5 1/32 1/16

18 10 1/2 8 15

8 1/2 10 1/2

3

11

27 1/4



**SUPREME COURT OF THE UNITED STATES****No. 71-895****NATIONAL LABOR RELATIONS BOARD, PETITIONER****v.****INTERNATIONAL VAN LINES****ORDER ALLOWING CERTIORARI, Filed February 28, 1972**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.





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# **In the Supreme Court of the United States**

OCTOBER TERM, 1971

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit insofar as it denied enforcement of the reinstatement provisions of the Board's order.

## **OPINIONS BELOW**

The opinion of the court of appeals (App. A, *infra*, pp. 15-31) is officially reported at 448 F. 2d 905. The opinion of the Board (App. D, *infra*, pp. 34-83) is reported at 177 NLRB 353.

## **JURISDICTION**

The judgment of the court of appeals (App. B, *infra*, p. 32) was entered on September 3, 1971. The

Board's timely petition for rehearing en banc was denied on October 12, 1971 (App. C, *infra*, p. 33). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

Whether employees engaged in an economic strike who are discharged for that activity before they have been permanently replaced and then continue to strike have an unconditional right to be reinstated to their former jobs.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*), are as follows:

#### SEC. 2. When used in this Act—

\* \* \* \*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

\* \* \*

\* \* \* \*

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \* \* \*

\* \* \* \*

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

#### STATEMENT

##### A. THE BOARD'S FINDINGS OF FACT

In August 1967, Teamsters and Warehousemen, Local 381 (the "Union"), began an organizing drive among the employees of the approximately ten moving van and storage companies located in the Santa Maria, California area, including International Van Lines

(the "Company") (App. D, *infra*, pp. 36, 54). On September 21, the Union, having obtained authorization cards from five of the Company's six full-time employees,<sup>1</sup> filed a representation petition with the Board's Regional Office. A copy of the petition was sent to the Company (App. D, *infra*, pp. 36, 55-56). Subsequently, the Union held meetings with the employees of the various moving van and storage companies, which resulted in a decision by the employees to strike. The strike began on October 4 with pickets carrying signs bearing legends such as "Unfair to Teamsters Local 381," "No Election. Why," and "No Contract" (App. D, *infra*, pp. 36, 59-60; Tr. 211-212).

That morning, when the president of the Company, Robert McEwan, arrived at the Company's warehouse and saw the pickets, he attempted to persuade his employees to come to work.<sup>2</sup> The employees who were present—including Richard Dicus, Manuel Vasquez, and Salvador Casillas—refused, stating: "\* \* \* we don't have a contract. We cannot cross the picket line." (App. D, *infra*, pp. 58-60; Tr. 326-327). Robert Vasquez also did not report to work that day because of the picketing (App. D, *infra*, p. 61). Unable to obtain replacements for his employees locally, Robert McEwan arranged with his brother, who operated another moving company—Mercury Van and Storage—

<sup>1</sup> The Company hires additional employees on a casual or part-time basis as its needs warrant (Tr. 53-56). "Tr." refers to the transcript of the testimony, and "G.C. Exh." to the General Counsel's exhibits, in the Board proceeding.

<sup>2</sup> Although the pickets at the warehouse were not employees of the Company, some of the employees were grouped in front of the warehouse (App. D, *infra*, p. 59).



at Oxnard, California, to obtain several employees whom his brother was in the process of laying off (App. D, *infra*, pp. 60-61; Tr. 329-330).

On October 5, five employees who had been laid off by Mercury—Mitchell, Hoffman, Burlington, Contreras, and Cross—worked for the Company (App. D, *infra*, p. 61; Tr. 330, 348-351). They were carried on Mercury's payroll for their work that day, however, and did not appear on the Company's payroll for the remainder of that pay period, which ended on October 11 (App. D, *infra*, . 3, n. 4; Tr. 330-331; G.C. Exh. 10A).<sup>3</sup> Also on October 5, the Company notified employees Manuel and Robert Vasquez and Richard Dicus by telegram that: "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced" (App. D, *infra*, pp. 36-3; G.C. Exhs. 2, 3, and 4).

Between October 8 and October 28, Dicus called on McEwan, who was in the hospital, and asked if he was going to have a job, but McEwan refused to commit himself (App. D, *infra*, p. 69; Tr. 78, 333-334). Manuel Vasquez also visited McEwan in the hospital to inquire about going back to work, but he too re-

---

<sup>3</sup> Thereafter, Contreras appeared on the Company's payroll only for the periods ending October 18 and October 25 and Burlington appeared only for the period ending October 25. Hoffman did not appear on the payroll until the period ending October 25. There is no evidence that Mitchell or Cross performed any further work for the Company (App. D, *infra*, p. 37, n. 4; G.C. Exh. 10B.) Robert McEwan continued to operate his business during the strike by hiring from time to time such other men as his needs required (App. D, *infra*, p. 71; Tr. 348-351).



ceived no commitment (App. D, *infra*, p. 70; Tr. 185). Shortly after McEwan left the hospital on October 28, Dicus went to his office and again asked if he was going to have a job. McEwan replied that he did not know and that it was "the principle of the thing" (App. D, *infra*, p. 69; Tr. 78-80).

In the latter part of November, employee Salvador Casillas went to McEwan's office and told him that he could no longer stay out on strike since, unlike the other men, he did not have a wife who worked. He asked to be placed on an "availability list" (App. D, *infra*, p. 37; Tr. 343-344). He was never called to work (Tr. 344). About December 12, Richard Dicus, Manuel Vasquez, and Robert Vasquez went to President McEwan's office and asked to be reinstated to their former jobs. McEwan replied: "No, I cannot do it, I got men working for me that stuck by me through all this thing, and I just cannot go out there and fire them" (App. D, *infra*, pp. 37-38, 70; Tr. 82-83, 124-125, 183-184). He added: "How would you guys feel if I put you back to work, and two or three weeks from now do the same thing to you?" (*ibid.*).

#### B. THE BOARD'S DECISION AND ORDER

The Board found that the Company's employees had been engaged in a lawful strike to compel the Company either to agree to a consent election or to grant immediate recognition to the Union (App. D, *infra*, pp. 39-40); that the Company's telegrams of October 5 in effect discharged employees Manuel and Robert Vasquez and Richard Dicus for engaging in the strike;

and that, since these employees had not been permanently replaced at that time, the Company's action violated Section 8(a)(3) and (1) of the National Labor Relations Act (App. D, *infra*, pp. 40-41). The Board also found that the unlawful discharges tended to prolong the strike, thereby converting "what had commenced as an economic walkout into an unfair labor practice strike;" accordingly it held that the Company further violated Section 8(a)(3) and (1) by refusing to reinstate, upon their unconditional applications, the three employees discharged by the telegrams, and Salvador Casillas (App. D, *infra*, p. 41). The Board ordered the Company to reinstate the four employees and to make them whole, from the date of their unconditional applications for reinstatement, for any loss of pay resulting from the Company's unlawful action (App. D, *infra*, p. 42).<sup>4</sup>

<sup>4</sup>The Board also found that the Company violated Section 8(a)(1) of the Act by threatening its employees with loss of benefits if they chose union representation (App. D, *infra*, pp. 35-36). The court below held that substantial evidence did not support this finding (App. A, *infra*, pp. 16-21), and the Board does not contest that portion of the court's decision here.

Finally, the Board found that a majority of the employees had signed authorization cards and that the Company's unfair labor practices "could only have had the effect of destroying conditions needed for a fair election" and ordered the Company to bargain with the Union upon request (App. D, *infra*, pp. 41-42, 43). The court below did not reach this aspect of the case (App. A, *infra*, p. 31). Accordingly, should this Court grant the Board's petition and reverse the court of appeals' decision with respect to the reinstatement rights of the affected employees, it would be necessary to remand the case to that court for a determination of the propriety of the bargaining order.

## C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's finding that the employees were engaged in a lawful economic strike, and that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Manuel Vasquez, Robert Vasquez, and Richard Dicus for striking and refusing to cross the picket line before these employees had been permanently replaced (App. A, *infra*, pp. 24-25). The court further found that, although Casillas did not receive a telegram, he was discharged for the same reason and under the same circumstances, and thus his discharge similarly violated Section 8(a)(3) and (1) (App. A, *infra*, p. 22). The Court, however, declined to enforce the reinstatement provisions of the Board's order.

In the court's view, the reinstatement provisions were dependent on a finding that the four employees became unfair labor practice strikers at the moment they were discharged. Disagreeing with such a proposition, the court concluded (App. A, *infra*, p. 27):

\* \* \* The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been dis-

charged would eliminate the distinction between the economic-striker-reinstatement rule [*National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333] and the unfair-labor-practice-strike-reinstatement rule *Mastro Plastics v. National Labor Relations Board*, 350 U.S. 270, in cases like this one \* \* \*. [Footnote omitted.]

Accordingly, the court held that the four employees were economic strikers who would not be entitled to reinstatement if the Company could show "legitimate and substantial business justifications" for refusing to reinstate them (App. A, *infra*, p. 28).

The court further noted that, "[w]hile the Board did find that the discharged employees had in fact not been permanently replaced (which we have already said is supported by substantial evidence), the Board did not inquire whether any other 'legitimate and substantial business justification' existed for not reinstating the four employees" (App. A, *infra* p. 28). The court therefore remanded the case to the Board for further findings on the Company's reasons for failing to reinstate the strikers (App. A, *infra*, pp. 28-29). In addition, the court found that the circumstances surrounding the refusal to reinstate Casillas were ambiguous and directed the Board to clarify that matter (App. A, *infra* pp. 29-31).<sup>5</sup>

<sup>5</sup> The court noted that Casillas, unlike the other three employees, was a "casual" worker, who worked for the Company only when summoned for a specific job. The court concluded that it was unclear whether McEwan declined to restore Casillas to the availability list or, if he had been restored, whether there was work for which he should have been called (App. A, *infra*, pp. 29-30).

# REASONS FOR GRANTING THE WRIT

The holding of the court below that the reinstatement rights of economic strikers who are unlawfully discharged are no greater than those of ordinary economic strikers is contrary to settled principles. Moreover, it undermines the firm guarantees which the National Labor Relations Act has heretofore accorded employees who engage in protected strike activity. Corrective action by this Court is thus warranted.

1. Decisions under the Act have consistently distinguished between employees who strike over economic objectives and those who strike to protest the unfair labor practices of an employer. The former are entitled to reinstatement unless the employer can show "legitimate and substantial business justifications" for the failure to do so, such as the continued presence of permanent replacements in the strikers' jobs. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-347; *National Labor Relation Board v. Fleetwood Trailer Co.*, 389 U.S. 375, 378. The latter, however, are entitled to reinstatement unconditionally, even though it may be necessary as a result to discharge permanent replacements hired during the strike. *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 278; *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2).

It is further settled that the discharge of economic strikers for strike absences before they have been permanently replaced constitutes discrimination against,

and interference with, strike activity, in violation of Section 8(a)(3) and (1) of the Act, and the courts of appeals, including the court below, have enforced Board orders requiring the unconditional reinstatement of such strikers. See, e.g., *National Labor Relations Board v. United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818, enforcing 96 NLRB 1108, 1112; *National Labor Relations Board v. Comfort, Inc.* 365 F. 2d 867, 874 (C.A. 8), enforcing 152 NLRB 1074, 1077-1079; *National Labor Relations Board v. Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9), enforcing 88 NLRB 1262, 1268; *National Labor Relations Board v. Buzza-Carodozo*, 205 F. 2d 889, 890-891 (C.A. 9), enforcing 97 NLRB 1342, 1344; *National Labor Relations Board v. Cowles Publishing Co.*, 214 F. 2d 708, 710-711 (C.A. 9), certiorari denied, 348 U.S. 876, enforcing 106 NLRB 801, 802. See also *Bonnar-Vawter, Inc. v. National Labor Relations Board*, 289 F. 2d 133 (C.A. 1).

The decision of the court below in this case is directly contrary to these precedents. The court, though finding that economic strikers Richard Dicus, Manuel and Robert Vasquez, and Salvador Casillas were discharged in violation of Section 8(a)(3) and (1), nonetheless concluded that they were entitled to no more than the qualified reinstatement rights of economic strikers; in the court's view, the "four employees were economic strikers when discharged and must be so treated here" (App. A, *infra*, p. 28). This reasoning, however, overlooks the fact that an employee who has been unlawfully discharged retains



his employee status for purposes of the Act, and is entitled, as a remedy for the unlawful discharge, to unconditional reinstatement with back pay to his former job. See Section 10(c) of the Act, 29 U.S.C. 160(c); *National Labor Relations Board v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263. A striker who has been unlawfully discharged is in no different position and is similarly entitled to unconditional reinstatement. See cases cited in preceding paragraph.

Accordingly, wholly apart from the fact that the four dischargees were strikers, the Company, because of its action in unlawfully discharging them, was under an unconditional obligation to reinstate them. Moreover, since the employees in question continued to strike after their discharge, it follows that they were then protesting not only the original grievance but also the subsequent unfair labor practice against them. They were thus entitled to reinstatement unconditionally as unfair labor practice strikers. See *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 928, n. 8 (C.A. 2); *National Labor Relations Board v. Frick Co.*, 397 F. 2d 956, 964 (C.A. 3); *General Teamsters Local Union No. 992 v. National Labor Relations Board*, 427 F. 2d 582, 587 (C.A. D.C.).

2. If permitted to stand, the decision of the court below would not only create uncertainty in an area where heretofore the rules have been relatively clear-cut, but would expose employees who engage in an economic strike to an added, substantial risk of job loss. Under that decision, once the employees have gone out on strike, the employer could discriminator-



ily discharge union leaders or others whom he disfavored and avoid an obligation to reinstate them by later establishing a "business justification" for refusing reinstatement. The employer could not thus minimize his reinstatement obligation by effecting such discharges while the employees were working; to allow him to do so during an economic strike would inevitably limit the employees' willingness to engage in such protected activity. Finally, the decision of the court below results in the anomaly that strikers who are unlawfully discharged are accorded less protection under the Act than are fellow strikers who are later discharged for protesting the initial discharges. A decision with these serious consequences warrants review by this Court.

#### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SAMUEL HUNTINGTON,  
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*National Labor Relations Board.*

JANUARY 1972.

1944

## APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 25,698

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

INTERNATIONAL VAN LINES, RESPONDENT.

[September 3, 1971]

On Petition to Enforce an Order of the National Labor Relations Board,

Before: BARNES, DUNIWAY and TRASK, Circuit Judges

DUNIWAY, Circuit Judge. The National Labor Relations Board petitions for enforcement of its order requiring International Van Lines (the Company) to cease and desist from interfering, in violation of section 8(a)(1) of the National Labor Relations Act (the Act) (29 U.S.C. § 158(a)(1)), with its employees' exercise of their rights under section 7 of the Act (29 U.S.C. § 157) and from discriminatorily discharging employees who favor unionization, in violation of sections 8(a)(1) and 8(a)(3) of the Act (29 U.S.C. §§ 158(a)(1) & (3)), and also requiring the Company to reinstate the discriminatorily discharged employees and to bargain with the Union.<sup>1</sup> We remand

<sup>1</sup> Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

the case to the Board for further findings and for modification of its order.

The *dramatis personae* are: Robert L. McEwan, president of the Company and active head of its business, (McEwan; his son, John G. McEwan, a student then approximately 18 years old who worked for the Company during the summer, (Johnny McEwan); Ben H. Sanders, secretary-treasurer of the Union and a prime Union organizer; Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvador Casillas, employees of the Company who were discharged after they refused to cross a picket line thrown around the Company's premises; and David Dicus, a student then about 17 years old, the son of Richard Dicus, and a summer employee of the Company.

The setting was a Union campaign, begun in August 1967, to organize the employees of all the moving and storage firms located in and around Santa Maria, California. There were about 23 such firms; the Company is one.<sup>1</sup> The Company was not part of any employer association or multi-employer bargaining unit. The Union's picketing of the Company, which began on October 4, 1967, formed part of its campaign. Some of the charges of unfair labor practices under section 8(a)(1) arose from alleged actions of the Company before the picketing; other charges grew out of the Company's response to the picketing.

**A. CHARGES THAT THE COMPANY THREATENED ITS EMPLOYEES, THEREBY INTERFERING WITH THEIR RIGHT TO ORGANIZE UNDER SECTION 7, IN VIOLATION OF SECTION 8(a)(1).**

The gist of these charges is that the Company communicated to some of its employees, using Johnny

<sup>1</sup> A related case is *NLRB v. Coast Delivery Service*, 9 Cir. 1971, 437 F.2d 264.

McEwan as an intermediary, threats of economic reprisal if the employees voted to unionize. Three conversations in which Johnny McEwan participated underlie the charges.

The first conversation occurred about September 1, 1967, while Johnny McEwan, David Dicus, Robert Vasquez, and Jimmy Weaver, another employee of the Company, were unloading a truck at the Company's warehouse. David Dicus testified that Johnny McEwan said "that if the union did come in, that our fishing trips would be gone. We would never have any more, and that is about as good as I can remember on the conversation then." David Dicus could not remember how the conversation arose; Johnny McEwan "came out with that little statement, and I know there was more in the statement, but all I can remember is actually that part. \* \* \* Robert Vasquez testified: "Well, John come in, and he asked us, he heard that we were joining the union, And I said, 'Yes.' Then he said that we should not, that his dad had said if we should join the union, that it is going to take all our benefits and rights, and he was going to work our 'ass.'"

The second conversation occurred around September 15, 1967, in the garage of David Dicus' father-in-law Johnny McEwan and two other men\* were helping David Dicus sand his car. David Dicus testified: "Well, John had heard the union was—we were trying—things about trying to get a union in, and that is what provoked—I said something about the union has better medical plans. It also gives you a future, and then he come up with a statement, his father

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\* One of the men was David Dicus' brother-in-law, and an employee of the Company. The other was a friend of David's sister-in-law; the record does not state whether he was an employee of the Company.

would handle the situation the same as he did or a friend of his did in Virginia, that he would make it so hard on the workers it would make them want to quit That is the whole conversation right there."

The third conversation occurred about September 29, 1967, at the home of David Dicus. Johnny McEwan visited the Dicus home to say good-bye before leaving for college; in addition to those two, only David's wife was present. David testified that the conversation began when he told Johnny that he had signed a union authorization card "because I wanted to see the rest of the workers get a good break. There is no future in moving, in the moving business, and I wanted to see a future in it." David said that Johnny's reply was "the same conversation that his dad handled it the same way, either he did or his friend did, he would make it so hard on the workers that they would want to quit if the union did come in."

During the cross-examination of David Dicus by counsel for the Company, the following colloquy developed:

"Q. During these conversations, did Mr. Robert McEwan, Jr. [sic] tell you that he was acting for and in behalf of his father?

A. He just told me how his father would handle it. \* \* \*

Q. Did Mr. McEwan or Robert H. McEwan [sic] say that my father told me to tell you this and this and this?

A. No sir. He just said that his father would handle this in this manner."

Nothing in the record further illuminates the question whether the parties to the various conversations believed Johnny McEwan to be acting as a representative of his father.

Responding to the General Counsel's argument that Johnny McEwan's remarks in these three conversations were, in effect, coercive statements to employees by the Company, the Trial Examiner stated:

"These part-time, casual, summer-time employees are involved in this controversy only by the accident of birth and filial loyalty. \* \* \* I do not think this expressed opinion of one college boy to his chum, both of whom are known to the employees as 'helpers' of summer-time duration only, constitute an unfair labor practice [under §8(a)(1)] on the part of the Company. The General Counsel's claim that this opinion of Johnny McEwan binds the Company, based only on his relationship to his father, is in reality, an admission of just how insubstantial is the General Counsel's case."

Noting that Johnny McEwan's father did not deny making the remarks that Johnny attributed to him, the Board reversed the Examiner's conclusions:

"Such remarks were uttered on the heels of an inquiry into the union sympathies of the employees and clearly identified Johnny's interest with the interests of his father and [the Company]. \* \* \* [W]e find that Johnny, in making the remarks and attributing them to his father, was acting as a conduit for his father and thereby coerced and interfered with the employee's exercise of their Section 7 rights. Accordingly, we conclude that in these circumstances the remarks uttered by Johnny McEwan violated Section 8(a)(1) of the Act. [footnotes omitted.]"

The Board's opinion to the contrary, it is immaterial whether the senior McEwan actually made the



anti-union remarks attributed to him by his son. What is important is whether the Company communicated anti-union threats to its employees. What McEwan said to members of his family has, by itself, no bearing on that question. It might have bearing if the evidence tended to show that McEwan authorized Johnny to convey his feelings to the employees, or that the employees reasonably believed that Johnny was speaking on behalf of his father, or that Johnny intended to do so.

None of these possibilities is supported by substantial evidence on the record considered as a whole. The record made before the Trial Examiner supports only the Trial Examiner's characterization of the conversations.

The Board cites *NLRB v. Champa Linen Service Company*, 10 Cir., 1963, 324 F.2d 28, and *NLRB v. W. R. Hall Distributor*, 10 Cir., 1965, 341 F.2d 359, for the proposition that an employer's son, himself an employee, may be found to have acted on behalf of his father in making antiunion statements to other employees, and that the statements may constitute an unfair labor practice. Those cases are factually distinguishable. The evidence there tended to show that the sons' activities were in fact undertaken on behalf of their fathers and that the activities went well beyond mere casual conversation. 324 F.2d at 30; 341 F.2d at 362-363. No comparable evidence appears here.

The Board refers us to testimony which, if believed, would establish that the senior McEwan told employee Richard Dicus that the employees would lose certain benefits if the Company were unionized. The Board states, however, that McEwan's statement is not alleged as an independent unfair labor practice, but is only "used to shed light upon the true character

of the Company's other activities." Wherever the statement does shed light, it does not tend to establish that Johnny McEwan's remarks were made on his father's behalf.

**B. CHARGES THAT THE COMPANY DISCRIMINATORILY DISCHARGED EMPLOYEES FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY IN VIOLATION OF SECTIONS 8(a) (1) AND 8(a) (3)**

On September 21, 1967, the Union petitioned the Board for certification as the exclusive bargaining agent of the Company's employees. At that time five of the Company's employees had signed Union authorization cards, a clear majority of the 6-man appropriate bargaining unit. The Company received a copy of the petition from the Board on September 25, 1967, and awaited further action by the Board. It is undisputed that at no time before October 4, 1967, did the Union demand recognition by the Company; nor did it undertake any other action to notify the Company directly that it wished and was entitled to be the exclusive bargaining agent. The only notification the Company had received came from the Board, not from the Union.

On October 2 and 3 the Union held meetings of the employees of all the moving and storage companies in the Santa Maria area. Ben Sanders, the Union organizer, addressed each meeting. He stated at both meetings that the company had consented to representation elections but had later withdrawn its consent. Sanders also stated that employees of local moving and storage companies other than International Van Lines were being discharged.

The October 3 meeting concluded with a decision to strike all the moving and storage companies the following day. A picket line appeared in front of the

Company's premises on October 4. Picket signs read, "Unfair to Teamsters Union Local 381" and "No elections. Why?" The men on the picket line were not employees of the Company. Some of the Company's employees were present, however, including Richard Dicus, Manuel Vasquez, and Salvador Casillas. All three refused to cross the picket line, and none reported to work the following day. McEwan testified that Robert Vasquez was not present during the picketing, but that McEwan saw Robert Vasquez drive toward the Company's premises and turn around without stopping; other testimony placed Robert Vasquez at the scene of the picketing. It is undisputed that Robert Vasquez did not report to work the next day. On October 5, 1967, Robert and Manuel Vasquez and Richard Dicus received identical telegrams that read as follows: "For failure to report to work as directed at 7 AM on Wednesday morning Oct 4 1967 you are being permanently replaced. [Signed] International Van Lines." Casillas did not receive a telegram, and it is not evident from the record how the fact of his discharge was communicated to him. It is undisputed, however, that he was discharged at about the same time and for the same reasons as the other three men. The reason given by McEwan for the discharges was that "it has been our policy \* \* \* in the past that if a man did not show up for work, why, he was let go. Not for one day, but for two."

The Company had a moving job scheduled for October 4, the day the picketing began. After failing to find men to do that job, McEwan obtained a one-day postponement from the firm for whom the work was to be done. McEwan attempted, unsuccessfully, to secure local men as replacement employees. He then telephoned his brother, president of Mercury Van and Storage Company (Mercury) in Oxnard, California,

and was able to hire three men that Mercury had scheduled for layoff, plus two other men from the Oxnard area. The replacements were carried on Mercury's payroll while the October 5 job was being performed, and the Company reimbursed Mercury for their wages. One of the replacement workers thereafter appeared on the company's payroll during the pay period from October 12 through October 18; another for the October 19-25 period; a third for the October 19-25 period and on four of the next five pay periods. The other two replacements never appeared on the Company's payroll.

On these facts, the Board found that the Company violated sections 8(a)(1) and 8(a)(3) of the Act by discharging the four employees. We uphold these findings.

*First:* The Trial Examiner wholly discredited, as a deliberate fabrication, Sanders' testimony that the Union's counsel had told him that the Company had consented to an election and had then reneged. The Trial Examiner also noted that nothing in the record showed that the Company had ever consented to a representation election, much less withdrawn its consent.

The Board properly regarded these findings of the Trial Examiner as legally irrelevant. Fabrication or not, it is undisputed that Sanders told the men assembled at the Union meeting that the Company had consented to an election and had then reneged. Nothing in the record suggests that the men believed otherwise, or had reason to believe otherwise. There is substantial evidence to support the Board's findings that the strike was motivated by that belief and that the purpose of the strike was to pressure the Company into holding a consent election.

We agree with the Board that "a strike for the purpose of persuading an employer to agree to a consent election is lawful even though a representation petition is pending before the Board." *Philanz Oldsmobile, Inc.*, 1962, 187 N.L.R.B. 867, 869, citing *New Orleans Roosevelt Corp.*, 1961, 132 N.L.R.B. 248, 257-258.<sup>4</sup> That the strikers' belief in the Company's unwillingness was mistaken does not remove their concerted activity from the protection of section 7 of the Act. *NLRB v. Phaostron Instrument & Electronic Co.*, 9 Cir. 1965, 344 F.2d 855, 858-859; *NLRB v. McCatron*, 9 Cir., 1954, 216 F.2d 212, 215. The work stoppage was a lawful and protected economic strike. Cf. *NLRB v. Erie Resistor Corp.*, 1963, 373 U.S. 221, 233-234.

Second: The protection given by the Act to economic strikers differs in scope from that given to participants in an unfair labor practice strike. See *Snow v. NLRB*, 9 Cir. 1962, 308 F.2d 687, 694. Economic strikers are not automatically entitled to reinstatement:

"[A]n employer, guilty of no act denounced by the statute, has . . . the right to protect and continue his business by [filling with replacements] places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the decision of the latter to resume their employment, in order

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<sup>4</sup> The Board found, in the alternative, that even if the purpose of the strike was to gain immediate recognition for the Union, rather than merely to force a consent election, the strike was lawful, even absent a prior demand for recognition, since no other union was then certified as a bargaining agent. Citing *Philanz Oldsmobile, Inc.*, 1962, 137 N.L.R.B. 867, 869-870; *United Mine Workers v. Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 75; *NLRB v. Washington Aluminum Co.*, 1962, 370 U.S. 9, 14. We do not pass on this question.

to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

*NLRB v. Mackay Radio & Telegraph Co.*, 1938, 304 U.S. 333, 345-346. Accord, *NLRB v. Fleetwood Trailer Co.*, 1967, 389 U.S. 375, 379. However, the employer is not free to discharge striking employees and then to find permanent replacements for them; "the discharge of economic strikers prior . . . to the time their places are filled constitutes an unfair labor practice." *NLRB v. Globe Wireless*, 9 Cir., 1951, 193 F.2d 748, 750. Accord, *NLRB v. McCatron*, 9 Cir., 1954, 216 F.2d 212, 215; *NLRB v. Comfort, Inc.*, 8 Cir., 1966, 365 F.2d 867, 874.

In this case the Board found, and now argues that: (1) The Company did not merely "replace" the four employees—i.e., did not discharge them after hiring replacements in order to be able to continue its business—but rather discharged them "in order to punish [them] for taking part in the strike." And (2) even if the Company did merely replace the four employees, the replacements hired were temporary replacements only, not employees who intended to work for the Company permanently; thus the four employees were discharged before the Company had obtained permanent replacements for them. Both of these findings are supported by substantial evidence on the record as a whole.

We therefore affirm the Board's findings that the Company violated sections 8(a)(1) and 8(a)(3) of the Act by discharging the four employees. *NLRB v. McCatron*, *supra*, 216 F.2d at 214-215; cf. *NLRB v. Globe Wireless*, *supra*, 193 F.2d at 750.

**C. CHARGES THAT THE COMPANY REFUSED TO REINSTATE THE DISCHARGED STRIKERS, IN VIOLATION OF SECTIONS 8(a)(1) AND 8(a)(3).**

The Board found that "[t]he discharge of the [four] employees, which had the natural effect of tending to prolong the strike, converted what had commenced as an economic walkout into an unfair labor strike. Accordingly, [the Company] further violated Section 8(a)(3) and (1) of the Act by refusing the reinstate, upon their unconditional applications," the four employees. We are unable to accept in full these findings of law and of fact.

Turning first to the questions of law, we momentarily assume for the sake of exposition that all four employees were improperly refused reinstatement. The Board bases its argument in support of the above conclusions on the following principles: Where an employer's unfair labor practice committed during the course of an economic strike is shown to be "a significant factor" in the strike, the burden falls on the employer to show that the strike was not thereby "prolonged or aggravated." If he does not, and the strike is found to have been prolonged or aggravated by the unfair labor practice, the economic strike is converted into an unfair labor practice strike. Citing *General Teamsters & Allied Workers Local Union 992 v. NLRB*, D. C. Cir. 1970, — F.2d —, ———. Unfair labor practice strikers are entitled upon request to reinstatement with back pay, even if the employer has in the meantime hired permanent replacements. See *Mastro Plastics Corp. v. NLRB*, 1956, 350 U.S. 270, 278.

Applying these principles to this case, the Board reasons that the Company's unfair labor practice in discharging the four employees was "a significant



factor" in the strike: that the Company did not meet its consequent burden; that the unfair labor practice converted the economic strike into an unfair labor practice strike; and that the four discharged workers are therefore absolutely entitled to reinstatement under the *Mastro Plastics* rule. Implicit in the Board's reasoning, though not explicitly stated, is the assumption that the conversion of the economic strike into an unfair labor practice strike necessarily converted the four discharged economic strikers into unfair labor practice strikers, to whom the *Mastro Plastics* rule properly applies.

That assumption is untenable. The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between [the] economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics*) in cases like this one.<sup>5</sup> Such a result is unwarranted in law and in reason.

<sup>5</sup> Elimination of the distinction would follow, strictly speaking, only in those cases where the discharge of economic strikers constitutes "a significant factor" in the prolongation of the strike. The Board argues that "[i]n this case, the Company's unfair labor practices were clearly 'a significant factor' in the strike, since the discharge of economic strikers 'necessarily . . . restrain[s] [employees] from engaging in concerted ac-

Accordingly, we need not determine whether the economic strike was converted into an unfair labor practice strike. The four employees were economic strikers when discharged and must be so treated here. *Cf. NLRB v. Frick Co.*, 3 Cir., 1968, 397 F.2d 956, 964; *Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 6 Cir., 1964, 331 F.2d 720, 729. The strikers are entitled to reinstatement unless the Company can show "legitimate and substantial business justifications" for refusing to reinstate them, one such justification being the unavailability of positions due to the hiring of permanent replacements under the *Mackay* rule, *NLRB v. Fleetwood Trailers Co.*, 1967, 389 U.S. 375, 379.

The Board did not pass on the question whether the discharged employees, if considered as economic strikers rather than as unfair labor practice strikers, were entitled to reinstatement. While the Board did find that the discharged employees had in fact not been permanently replaced (which we have already said is supported by substantial evidence), the Board did not inquire whether any other "legitimate and substantial business justification" existed for not reinstating the four employees. The Board has requested, however, if we find the discharged strikers not subject to the unfair-labor-striker-reinstatement rule, that we remand the case to the Board "for further findings

tivities for their mutual aid and protection \* \* \*." The Board adduces no evidence in support of this "necessary" effect. Compare *NLRB v. James Thompson & Co.*, 2 Cir., 1963, 208 F.2d 743, 749 (L. Hand, J.). If the discharges in this case so "necessarily" constituted "a significant factor" in prolonging the strike, discharges of economic strikers will be significant factors in prolonging virtually any economic strike.

concerning the Company's reasons for failing to reinstate the strikers." We do so.\*

We turn now to the questions of fact surrounding the requests for reinstatement. Substantial evidence supports the Board's findings that, on December 12, 1967, Richard Dicus, Manuel Vasquez, and Robert Vasquez went to McEwan's office and unconditionally requested to be reinstated. The Company argues that the requests were in reality conditioned upon the Company's agreeing to sign a contract with the Union. While such a condition is perhaps inferrable from the entire course of events surrounding this dispute, the record shows that the three workers' requests for reinstatement had no conditions expressly attached. It is undisputed that McEwan declined to reinstate the three men.

The situation as to Salvador Casillas is different. Unlike the other three, who were regular employees of the Company, Casillas was a "casual" worker—one who worked for the Company only when summoned by the Company for a specific job. Casillas had been notified to come to work on October 4, the day the strike began; he did not, and was therefore discharged. According to McEwan's testimony, Casillas came to McEwan's office sometime in the latter part of November to request reinstatement. McEwan testified that Casillas "told me he could not stay out on

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\* Strictly speaking, the Board requested us to remand the case if we find that "the strike was not converted into an unfair labor practice strike" but remained an economic strike. The view we take does not require us to answer that question. Our result, however, treats the discharged strikers as economic strikers—exactly as they would be treated had we made the finding upon which the Board predicates its request for a remand. Since the same further findings would be needed in either case, we think the remand is appropriate here.

strike any more . . . and that he had to go back to work and he asked me if he could be put on an availability list of my company." McEwan replied "that I would put him down as jobs come in, that we could use him on things, and why, we would call him." McEwan added that he had not had occasion to summon Casillas for work since then.

McEwan's testimony is all the evidence concerning the question of Casillas' reinstatement. The Board found that Casillas was in fact not reinstated, but it gave no reasons for its conclusion. On this record, we hesitate to accept such a bare finding. It is possible that the Board wholly discredited McEwan's testimony that he would place Casillas on the availability list; it is also possible that the Board accepted that testimony but found that McEwan subsequently declined to summon Casillas even though sufficient work may have been at hand. On the present record, we doubt that substantial evidence exists to support the former; we would be more favorably disposed toward the latter, if the Board could show that McEwan in fact could have used Casillas but chose not to call him. We see no need to resolve the ambiguity ourselves, however. Since we are remanding the case to the Board for other matters, we also direct the Board to determine, on remand, whether McEwan declined to restore Casillas to the availability list or whether Casillas had been restored to the list but had not been called to work; and if the latter, whether there was work for which he should have been called, so that failure to call him amounted to refusal of reinstatement.

We do not now pass on the propriety of the Board's bargaining order in this case. It will be time enough to do so if the case comes before us again on the Board's petition for enforcement.

The case is remanded to the Board for the determinations required by Part C of this opinion and for modification of the Board's order in accordance with Part A of the opinion.

## APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 25698

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES, RESPONDENT

### JUDGMENT

Upon Petition to Enforce an Order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from The National Labor Relations Board and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said National Labor Relations Board in this Cause be, and hereby is remanded to the Board for the determinations required by Part C of this opinion and for modification of the Board's Order in accordance with Part A of the opinion.

[Entered September 3, 1971] WM. B. LUCK,  
Clerk,  
R. D. HEWITT,  
Deputy.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 25,698

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES, RESPONDENT

*Order*

Before: BARNES, DUNIWAY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition of the National Labor Relations Board for a rehearing and to reject its suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

[Entered October 12, 1971]



## APPENDIX D

United States of America Before the National  
Labor Relations Board

INTERNATIONAL VAN LINES

and

TEAMSTERS AND WAREHOUSEMEN, LOCAL 381, INTER-  
NATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN, AND HELPERS OF AMERICA

### DECISION AND ORDER

On November 20, 1968, Trial Examiner David F. Doyle issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in certain unfair labor practices and recommending dismissal of the complaint in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision and the exceptions and briefs, and adopts the Trial Examiner's findings, conclusions and recommendations only to the extent consistent herewith.

1. The Trial Examiner found that certain statements made by Johnny McEwan, son of Respondent's president, on several different occasions were not violative of Section 8(a)(1) of the Act. Contrary to the Trial Examiner, and for the reasons detailed hereafter, we find that certain remarks made to employees by Johnny McEwan on company premises were violative of the Act.

David Dicus testified that around September 1<sup>1</sup> while he, Robert Vasquez, and Jimmy Weaver, employees at the warehouse, were unloading a truck, Johnny McEwan said, "if the Union did come in, that our fishing trips would be gone. We would never have any more \* \* \*" Employee Vasquez testified that Johnny came in and "asked us, he heard that we were joining the union." When Vasquez answered in the affirmative, Johnny said that "we should not, that his dad had said if we should join the union, that it [sic] is going to take all our benefits and rights, and he was going to work our \* \* \*" Vasquez' version of this conversation not only supplies the context in which the conversation took place but also attributes the coercive remarks to Johnny's father and Respondent's president, Robert McEwan. The latter did not deny making such remarks to his son.

Such remarks were uttered on the heels of an inquiry into the union sympathies of the employees and clearly identified Johnny's interest with the interests of his father and Respondent.<sup>2</sup> In view of a similar statement made to employee Richard Dicus by

<sup>1</sup> Unless otherwise indicated, all dates refer to events which occurred in 1967.

<sup>2</sup> For similar reasons, we have excluded from bargaining units the children of individuals who have substantial stock interests in closely held corporations. See *Foam Rubber City #2 of Florida, Inc., d/b/a Scandia*, 167 NLRB No. 81.

Johnny's father,' we find that Johnny, in making the remarks and attributing them to his father, was acting as a conduit for his father and thereby coerced and interfered with the employees' exercise of their Section 7 rights. Accordingly, we conclude that in these circumstances the remarks uttered by Johnny McEwan violated Section 8(a)(1) of the Act.

2. The Trial Examiner also found that Respondent did not violate Section 8(a)(3) by discharging and refusing to reinstate striking employees Manuel and Robert Vasquez and Richard Dicus and by refusing to reinstate striking employee Salvador Casillas. We disagree.

The Union was attempting to organize simultaneously the employees of all or almost all of the van and storage companies in the Santa Maria area, including the Respondent. It is clear that the Union had by September 11 secured authorization cards from a majority of Respondent's employees in an appropriate unit of Respondent's employees but did not make a demand on Respondent for recognition. Instead, the Union filed a representation petition with the Board on September 21 limited to such unit. Union meetings of employees of all the area companies were held on October 2 and 3 and thereafter a strike and picketing commenced at Respondent's premises on October 4. One of the picket signs carried the legend, "Unfair to Teamsters Union Local 381," and underneath, "No elections. Why." On October 5 Respondent sent iden-

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<sup>3</sup> Dicus testified that on October 3 Robert McEwan told him, "If the union gets in here, we cannot have fishing trips and picnics and Christmas bonuses." McEwan admitted that he mentioned fishing trips, barbecues, and picnics but testified that these benefits were discussed in connection with the effect unionization would have on Respondent's ability to continue such benefits.

tical telegrams to employees Manuel and Robert Vasquez and Richard Dicus, stating, "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced."

Robert McEwan testified that the strikers had been replaced as of October 5 by Harold Mitchell, Gary Hoffman, Blaine Burlington, Ysmael Contreras, and Don Cross. However, the record shows, and the Trial Examiner found, that these were temporary replacements.<sup>4</sup> Subsequently, the striking employees made requests for reinstatement. Robert McEwan admitted in his testimony that in the latter part of November employee Salvador Casillas came to his office and told him that he could not stay out on strike like the other men who had wives working and that he had to go back to work. Casillas asked to be placed on an "availability list."<sup>5</sup> Contrary to the Trial Examiner's findings, the record shows further, and we find, that on December 12 Manuel and Robert Vasquez and Rich-

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<sup>4</sup> The replacements worked for Respondent on Thursday, October 5. They formerly worked for Robert McEwan's brother at Mercury Van & Storage but were being laid off as of October 5, the end of Mercury's pay period. Although Respondent's pay period began on October 5, the men were carried on Mercury's payroll for the day they worked for Respondent. Indeed, there is no evidence that any of the men worked for Respondent on the remaining days of its pay period which ended October 11 or that Mitchell and Cross performed any further work for Respondent through the pay period ending November 29. Moreover, through the pay period ending November 29, Contreras was carried on Respondent's payroll only for the pay periods ending October 18 and 25. Burlington worked only during the pay period ending October 25, and Hoffman first appeared on Respondent's payroll during the same pay period.

<sup>5</sup> Based on the foregoing testimony, we find that Casillas made an unconditional application for reinstatement in November 1967.

ard Dicus made unconditional offers to return to work but were refused.\*

The Trial Examiner viewed the General Counsel's evidence as establishing an industrywide strike beginning on October 4 which was allegedly caused by the Union's secretary-treasurer, Ben Sanders, announcing at the October 2 and 3 union meetings that Respondent and other van lines had withdrawn their consent to an election.<sup>7</sup> Sanders also testified that an-

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\*The Trial Examiner inadvertently refers to the date as December 21.

<sup>7</sup> Principally because there was no foundation established on the record to support the fact that Respondent had even consented to an election, let alone withdrawn such consent, the Trial Examiner discredited this testimony and characterized it as "a fabrication by Sanders to give a semblance of excuse for his arbitrary and precipitate conduct in calling the work stoppage." It appears that the Trial Examiner was persuaded to this conclusion by the testimony of employee Richard Dicus who testified that at the October 3 meeting the van line situation was discussed in general but Respondent was not mentioned by name at any time.

In discrediting Sanders' testimony, the Trial Examiner appears to have focused on the issue whether the Respondent's withdrawal of consent was true or false. The General Counsel took the position at the hearing, as well as in its brief, that the truth or falsity of the assertion was irrelevant, stating that the testimony was being adduced only for the purpose of establishing the basis for the Union's decision to strike. As such testimony would tend to establish an economic motivation for the strike, we find merit in this contention. Moreover, insofar as the Trial Examiner discredits Sanders' testimony on the basis of Dicus' apparent denial that Respondent was mentioned by name at the October 3 meeting, the Trial Examiner leaves the erroneous impression that the General Counsel induced Dicus to modify his testimony through leading questions on redirect examination. The record shows, however, that Dicus testified on cross-examination that he left the meeting early and Respondent's name might have been mentioned after he left. Indeed, Casillas, who did remain until the end of the meeting, corrob-

other reason for the strike was the dismissal of employees from other companies.\*

While the record evidence supports a finding that one of the objects of the strike was to bring pressure on Respondent to agree to a consent election,<sup>9</sup> we need not predicate our disagreement with the Trial Examiner's conclusions on such evidence. For even accepting the Trial Examiner's premise that the strike was at best aimed at seeking immediate recognition of the Union, a finding which is clearly supported by the record, there is nothing unlawful or against public policy in employees striking for such purpose when

orated Sanders' testimony that there was discussion concerning the withdrawal of consent to an election by three van lines, including Respondent, and that this news precipitated the strike. Casillas testified "we just decided, well, they don't want to consent to an election. We are going to go on strike, and we all started making picket signs that night." This testimony is consistent with the admitted fact that an industrywide strike occurred on the following day and with the "No elections. Why." legend that appeared on one of the picket signs.

\* The Trial Examiner restricted the evidence to events which pertained only to Respondent, notwithstanding evidence tending to show that decisions at the union meetings were made by and for employees of *all* the van and storage companies. Indeed, the General Counsel's rejected offer of proof indicates that the strike and picketing began on September 27 at the premises of another employer, Coast Delivery Service, because it had allegedly discharged employees for union activity, and that the decision to strike this employer and any other employer who similarly discharged employees for union activity was made at a general union meeting on September 26. While the exclusion of this background evidence was not helpful in developing a well-rounded record, we conclude its exclusion was not prejudicial.

<sup>9</sup> A strike to bring pressure on an employer to agree to a consent election is not unlawful or against public policy. *New Orleans Roosevelt Corp.*, 132 NLRB 248; *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 869.

no other union has been certified." Moreover, the strike does not lose the protection of the Act merely because the Union did not present beforehand a specific demand upon the Respondent for recognition. The Supreme Court has stated unequivocally that the language of Section 7 is "broad enough to protect concerted activities whether they take place before, after, or at the same time" a demand is made.<sup>10</sup> Nor are we here concerned with the reasonableness of or the justification for the decision to strike. It is settled law that the wisdom or unwisdom of a strike, the justification or lack of it, does not alter its status as a protected activity.<sup>11</sup> Accordingly, we conclude that on and after October 4, Respondent's employees were economic strikers who retained their status as employees until such time as they were permanently replaced.

We turn now to a consideration of the legal effect on the status of the strikers of Respondent's telegrams of October 5.<sup>12</sup> While these wires are couched in language indicating that the three employees to whom they were addressed were being permanently replaced, their clear import is that they were being discharged for not working; i.e., for engaging in a strike. Moreover, as found by the Trial Examiner, at the time the wires were sent only temporary replacements had been hired. Indeed, the Respondent neither contended nor does the record show that the strikers were re-

<sup>10</sup> *Philanz Oldsmobile, Inc.*, *supra* at 869.

<sup>11</sup> *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 14. However, prior to striking the Union had, as previously indicated, filed a petition limited to Respondent's employees and copies of such petition had been served upon the Respondent's which thus knew the Union claimed to represent its employees.

<sup>12</sup> *N.L.R.B. v. MacKay Radio and Telegraph Co., Inc.*, 304 U.S. 333, 344.

<sup>13</sup> As the Trial Examiner found that the strike was unprotected, he did not reach this issue.



placed by new employees other than those whom the Trial Examiner found to be temporary replacements. In these circumstances, we conclude that Respondent, by sending these wires, intended to and did discharge employees Manuel and Robert Vasquez and Richard Dicus for engaging in a strike and thereby violated Section 8(a)(3) and (1) of the Act.

The discharge of the aforesaid employees, which had the natural effect of tending to prolong the strike, converted what had commenced as an economic walk-out into an unfair labor practice strike.<sup>14</sup> Accordingly, Respondent further violated Section 8(a)(3) and (1) of the Act by refusing to reinstate, upon their unconditional applications, Salvador Casillas, Manuel and Robert Vasquez, and Richard Dicus.

3. The General Counsel contends that the Union represented a majority of Respondent's employees in an appropriate unit, and we agree that a unit of all of Respondent's employees with the usual exclusions is an appropriate unit.<sup>15</sup> The record shows that on September 21, the date the Union filed its petition for representation with the Board, the unit consisted of six full-time and part-time employees who were eligible to select a collective-bargaining representative.<sup>16</sup>

<sup>14</sup> *Coast Radio Broadcasting Corporation d/b/a Radio Station KPOL*, 166 NLRB No. 72.

<sup>15</sup> As Respondent's business is seasonal and a number of part-time employees are hired in the peak season (July-September), all regular part-time employees who worked or will work a minimum of 15 days in the 3-month period from July to September are includible in the unit. *Motor Transport Labor Relations, Inc.*, 139 NLRB 70.

<sup>16</sup> Included in the unit were Richard and David Dicus, Manuel and Robert Vasquez, Jimmy Weaver, and David Poncetta. Johnny McEwan is excluded from the unit because he is the son of Respondent's president and the Respondent is a closely held corporation. *Foam Rubber City #2 of Florida, d/b/a Scandia*, *supra*.

As found by the Trial Examiner, all of these employees except Weaver had signed authorization cards by September 11. Although Poncetta was apparently discharged for cause on October 2, we find that the Union still represented a majority of Respondent's employees when Respondent discharged three union adherents on October 5.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having also found that the Respondent unlawfully discharged employees Manuel and Robert Vasquez and Richard Dicus and that the striking employees became unfair labor practice strikers, we shall order the Respondent to reinstate, or offer immediate and full reinstatement to, Manuel and Robert Vasquez, Richard Dicus, and Salvador Casillas to their prestrike or substantially equivalent jobs with all of the rights and benefits they would have accumulated but for the discrimination against them, discharging, if necessary, any strike replacements. The Respondent shall also be required to make whole the above-named employees for any losses they may have suffered as a result of the Company's failure to reinstate them beginning 5 days after their unconditional applications for reinstatement and continuing until the date of their reinstatement. As the record does not clearly establish whether Salvador Casillas was a full-time or part-time employee, resolution of his status and his concomitant benefits under this decision will be deferred to the compliance stage of this proceeding.

Any backpay due will be determined in accordance with the formula set forth in *F. W. Woolworth Co.*,

90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Having concluded that Respondent, by discharging Manuel and Robert Vasquez and Richard Dicus on October 5, engaged in unfair labor practices violative of Section 8(a)(3) and (1), we are further persuaded that such conduct demonstrates that Respondent had completely rejected the collective-bargaining principle and its violations could only have had the effect of destroying conditions needed for a fair election.<sup>17</sup> As the Union did represent a majority of the employees in an appropriate unit prior to the discriminatory discharges, we conclude that only a bargaining order can adequately restore as nearly as possible the situation which would have existed but for the Respondent's unfair labor practices.<sup>18</sup> Accordingly, we shall order Respondent, upon request, to bargain with the Union in the unit herein found appropriate.

#### CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union has been at all material times the statutory bargaining representative of Respondent's employees in the following appropriate unit for collective bargaining: all full-time employees and all regular part-time employees employed at the Employ-

<sup>17</sup> *The Maxwell Company*, 164 NLRB No. 97.

<sup>18</sup> While the Union made no formal demand on Respondent for recognition, such a demand is not a prerequisite to our granting a bargaining order in these circumstances. *Western Aluminum of Oregon Incorporated, et al.*, 144 NLRB 1191, 1192; *L. B. Foster Company*, 168 NLRB No. 15.

er's Santa Maria, California, operations, excluding office clerical employees, guards, and supervisors as defined in the Act.

4. By discharging Manuel and Robert Vasquez and Richard Dicus because they participated in the October 4, 1967, strike, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The strike which commenced as an economic strike on October 4, 1967, was prolonged by the Company's unfair labor practices, and was converted on October 5, 1967, into an unfair labor practice strike.

6. By refusing to reinstate Salvador Casillas, Manuel and Robert Vasquez, and Richard Dicus, after their unconditional application, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By threatening employees with reprisals and loss of benefits if they should join the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent has not violated the Act in respects not found herein.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Van Lines, Santa Maria, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals and loss of benefits if they should join a union.

(b) Discouraging membership in Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or in any other labor organization, by discharging or in any other manner discriminating against strikers in regard to hire or tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization, to form labor organizations, to join or assist Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive bargaining representative of all its employees in the aforesaid appropriate unit,<sup>19</sup> with respect

<sup>19</sup> Described in paragraph number 3 of the Conclusions of Law.

to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvador Casillas immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired subsequent to the discharges of October 5, 1967.

(c) Make whole Manuel Vasquez, Robert Vasquez, Richard Dicus, and Salvador Casillas for any losses they may have suffered because of the discrimination against them, in the manner set forth in the section herein entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due and the rights of reinstatement under the terms of this Order.

(e) Notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Post at its offices in Santa Maria, California, copies of the attached notice marked

"Appendix."<sup>20</sup> Copies of such notice, on forms provided by the Regional Director for Region 31, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

It is further ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

Dated, Washington, D.C., June 30, 1969.

GERALD A. BROWN,  
*Member,*

HOWARD JENKINS, Jr.,  
*Member,*

SAM ZAGORIA,  
*Member,*

(Seal) *National Labor Relations Board.*

<sup>20</sup> In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."



## APPENDIX

### NOTICE TO ALL EMPLOYEES PURSUANT TO THE DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not threaten our employees with reprisals and loss of benefits if they should join a union.

We will not discourage membership in Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or in any other labor organization, by discriminating in any manner against employees because they strike or engage in any activity protected by the National Labor Relations Act.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent permitted by the provisos in Section 8(a)(3) of the Act.

We Will, upon request, bargain collectively with Teamsters and Warehousemen, Local 381, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen, And Helpers Of America, as the exclusive representative of all employees in the appropriate unit described below and embody all understandings reached in a signed agreement. The appropriate unit is:

All full-time employees and all regular part-time employees employed at our Santa Maria, California, operations, excluding office clerical employees, guards, and supervisors as defined in the Act.

We Will offer to Manuel Vasquez, Robert Vasquez, Richard Dieus, and Salvador Casillas immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired after the discharges of October 5, 1967.

We Will make whole Manuel Vasquez, Robert Vasquez, Richard Discus, and Salvador Casillas for any losses they may have suffered because of the discrimination against them.

We Will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

International Van Lines

(Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

(Representative)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Bartlett Building, 215 West 7th St., Los Angeles, California 90014, Telephone 213-688-5801.

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California

INTERNATIONAL VAN LINES

and

TEAMSTERS AND WAREHOUSEMEN, LOCAL 381, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

David F. Doyle, Trial Examiner: This proceeding, with the parties represented by the persons named above, was heard by the Trial Examiner at Santa Maria, California on April 3, 4, 11, 1968, on complaint of the General Counsel and answer of the Respondent.<sup>1</sup>

<sup>1</sup> In this Decision International Van Lines is referred to as the Company or the Respondent; Teamsters and Warehousemen, Local 381, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the Union; the General Counsel of the Board and his representative at the hearing as the General Counsel; the National Labor Relations Board as the Board; and the Labor Management Relations Act, as amended, as the Act.

The complaint dated November 29, 1967 was based on a charge filed by the Union on October 12, 1967.<sup>\*</sup> The complaint alleged in substance that the Company had violated Sections 8(a)(1) and (3) of the Act by (1) the discriminatory discharge of four employees named, Sal Casillas, Richard L. Dicus, Manuel Vasquez, Sr., and Robert Vasquez because they had engaged in protected Union activities and (2) by certain coercive conduct of Company supervisors which is described hereinafter.

In its duly filed answer the Company denied the commission of any unfair labor practices but admitted certain allegations concerning the nature of the Company's business and the Union.

At the hearing, counsel for the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record and to file briefs and proposed findings. The General Counsel and counsel for the Company have filed briefs which have been carefully considered.

Upon the entire record in the case and upon my observation of the witnesses, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE COMPANY

The pleadings and a stipulation of the parties at the hearing establish that the Company is a California corporation with a warehouse in Santa Maria, California. The Company is engaged in the transportation of household goods by motor vehicle. During the past year the Company in the course and conduct of

<sup>\*</sup> All dates in this Decision are in the year 1967 unless specified otherwise.

its trucking operations within the State of California derived gross income in excess of \$50,000 from operations performed pursuant to contracts or arrangements with Republic Van Lines, and other corporations which engage in the interstate transportation of household goods.

During the year prior to the issuance of the complaint Republic Van Lines, derived revenues valued in excess of \$50,000 for and from the transportation of household goods in interstate commerce between the different states of the United States.

It is found, therefore, that the Company at all times material herein has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The pleadings and a stipulation of the parties at the hearing establish and I find, that the Union at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### *The Issues*

At the hearing the General Counsel claimed (1) that the evidence established that the Union began an organizational campaign among the Company's employees and that because of the Company's unfair labor practices the employees of the Company engaged in an unfair labor practice strike, during which the four employees named above were discharged because they engaged in the said strike and other protected union activities. The General Counsel claimed that the alleged discharges were designed to undermine the

Union and to destroy its majority in an appropriate unit.

He also contended (2) that the Company had violated Section 8(a)(1) of the Act by (a) threatening its employees with loss of economic benefits or detrimental reprisals, if they assisted the Union, and (b) by interrogating employees concerning their Union membership and activities, and (c) by creating the impression that the Company kept the Union activities of the employees under surveillance.

The Company at the hearing contended that the strike of employees which occurred on October 4, 1967, was not an economic strike; that it occurred without notice or warning and without prior demand for recognition made by the Union upon the Company; and that the strike was neither caused nor prolonged by any unfair labor practices on the part of the Company and that the named employees were lawfully replaced in the course of the work stoppage. The Company denied that any of its officers had committed any acts which attempted to interfere, restrain or coerce its employees.

#### *Undisputed Facts in Background of Controversy*

As noted previously, the Company engages in the business of moving household goods by motor van. Its place of business is located in Santa Maria, California, and a large portion of its moving business is derived from the movement of personnel, both civilian and military, into and out of Vandenberg Air Force Base which is in the area.

The Company is a corporation with its stock owned by two brothers; Robert L. McEwan owns 30 percent of the stock, is the Company president and the active head of the business at Santa Maria, John R. McEwan, Jr., owns 70 percent of the stock, but has his

own business in Southern California and did not participate in the direct events of this controversy or testify.

Two other McEwans participated in these events,, one is the father of the owner-stockholders, by name, John R. McEwan, Sr., and the other is the son of Robert L. McEwan, by name, John G. McEwan.

It is alleged in the complaint that John G. McEwan who is approximately 17-18 years of age and is a divinity student attending a seminary at Concordia, Missouri and who worked during the summer for the Company committed unfair labor practices. In order that this boy may not be confused with his elders, he will be referred to herein as "Johnny McEwan."

It is undisputed that the Company bought its business as a going concern from one, A. J. Smith, in July 1967, and during that month John R. McEwan, Jr., took over its active control.

It is likewise undisputed that around the last of August, 1967, the Union began an organizing campaign among the employees of *all* the *van* and *storage companies* located in and around Santa Maria, California. This organizational campaign was directed by Ben H. Sanders, the secretary-treasurer of the Union, who testified in the proceeding. It is conceded by the counsel for all parties that the organizational activity of the Union extended to approximately 23 individual companies who were owned by ten or 11 separate employers. It is likewise conceded that the Company is a *single* employer and that the Company is not a member of any employers association of moving companies, van lines or other employers. Indeed, it is conceded that in the Santa Maria area no group or association of van-line employers exists. It is likewise undisputed and conceded that while the Union's



organizational activities were directed to numerous employers, each employer was organized as a single employer unit and when the Union sought certification of representatives, it sought certification for the employees of single employers; thus, when the Union filed a petition for certification in Case No. 31-RC-666 on September 21, 1967, it named this employer as International Van Lines and asked for certification of a unit composed of, all truck drivers, packers, traders, order filers, checkers, warehousemen, leaders, and helpers, etc., of the Company at its Santa Maria, California location. The petition stated that the Company employed five men in the appropriate unit which the Union proposed.

*The Organizational Efforts of the Union  
As Regards the Company*

It is undisputed that in the course of its general campaign in the Santa Maria area the Union experienced some success in recruiting membership from the employees of the Company. Of the Company's personnel Richard L. Dicus, Robert Vasquez, and Manuel A. Vasquez, and David Dicus signed authorization cards for the Union on August 23, and David Ponceta signed an authorization card on September 11.

On September 21, George A. Pappy, Esq., of the law firm of Brundage and Hackler as attorney for the Union filed a petition with the 31st Region of the Board (Los Angeles, California) requesting certification of representative in the appropriate unit of the Company's employees at Santa Maria, California. This petition stated that the number of employees was five, and that the Union represented more than 30 percent of the employees in the proposed unit.

*The Strike Without Demand for Recognition  
Without Notice to the Company, and while  
Board Action was Pending*

The petition filed on Thursday, September 21, was transmitted by the Regional Office by regular mail from Los Angeles and received by the Company on September 25, the following Monday. The strike of the employees of the Company and *all other van lines* in the area occurred on October 4, some nine days later. It is undisputed that although the Union had secured authorization cards of four employees on August 23, and of a fifth employee on September 11, it had *not* prior to the date of the strike, demanded recognition of the Company or told the Company that it claimed to represent the Company's employees, or offered to the Company to prove its majority by a showing of authorization cards to either Company officials or to a third party who might determine their authenticity; nor did the Union check the cards against any payroll of the Company or request the Company to provide any payroll records for the purpose of verifying its claimed majority.

Thus, the only claim of majority status or request for recognition transmitted to the Company is that contained inferentially in the transmittal of a copy of the Union's petition from the Board to the Company, with the Board's notice that a representation proceeding had been instituted.

Thus, having received notice from the Board of the pending proceeding the Company awaited action by the Board. With this the prevailing state of affairs, the Union struck the Company and all other van lines in Santa Maria on October 4.

### *The Undisputed Cause of the Work Stoppage*

Ben H. Sanders, secretary-treasurer of the Union testified as to the Union's reasons for striking the Company. Called as a witness by the General Counsel, he testified that a meeting was held of *all* employees of *all* the van lines in the Santa Maria area on October 2. Sanders testified that he announced to the "members attending the meeting that some companies, including International Van Lines, had withdrawn their consent to an election, and we were going to have time—wanted to have time to check it out to make sure that it was right." It was then agreed by union adherents present that another meeting would be held the next evening. At this meeting, Sanders, "announced to the employees attending the meeting that we had checked with our legal counsel and found that International Van Lines and other van lines that we had filed elections on and the companies that had consented to an election had withdrawn their consent for an election."

In the discussion that followed, it was decided to strike International Van Lines and all other van lines.

On cross-examination, Sanders admitted that he did not know, if any documents consenting to an election had been filed with the Board by the Company; nor had he any knowledge that the Company had consented to an election either verbally or in writing. Sanders said that he had called union counsel in Los Angeles, who told Sanders that he (counsel) had called the Regional Office of the Board and *someone there* had told him (counsel) that some person had gone to the Regional Office and "withdrawn all the consents to the elections on the three petitions that had been filed."

It should be noted at this point that the General Counsel failed to prove in this entire case that (1) any written or verbal, formal or informal consent to election, was ever given by the Company to the Union or to the Board or (2) ever withdrawn by the Company. Undisputed evidence offered by the Company is to the effect that no consent was ever given and no consent was ever withdrawn. As stated previously, at this point in time the Company was awaiting action by the Board on the Union's pending representation proceeding.

On redirect examination, the General Counsel asked Sanders if the erroneous "withdrawal of consent" was the only reason for placing pickets at International Van Lines. In answer Sanders said, "The other reason, *other employees from other companies were being dismissed.*"

On the morning following the second meeting the Union picketed the premises of the Company and all other van lines in the Santa Maria area.

Richard Dicus, one of the union adherents who was called as a witness for the General Counsel testified that when he arrived at the Company's warehouse on October 4 he was surprised to see pickets patrolling in front of the place. He did not know these men; they were not employees of the Company, but he thought they were employees of some other van line in the area. Meador, the office manager of the Company came to the office door at that point and Dicus asked him, "What goes here?" Meador replied that he didn't know, and went back into the office. A few minutes later Robert McEwan drove up to the office and went inside. In a moment or two he came out with a cup of coffee in his hand and Dicus said to him, "Where is your union contract?" McEwan said that he had not seen a union contract. Then Dicus said

that the men had been told at the union meeting and by the pickets that the Company's consent to an election had been withdrawn, and all that the men wanted was a chance to vote for it or against the Union. McEwan replied that he had not withdrawn any consent to any election and looked very surprised. Dicus then suggested that if he were permitted to call the union office that the Union would send a contract over to McEwan in about 10 minutes. At that point McEwan replied, "Hell, no. I'm not signing anything," and went back into the office. Later in his testimony, Dicus stated most positively several times that at the meeting on the evening of October 3, the persons at the meeting discussed the van line situation in *general* but did not mention International Van Lines by name at any time. However, on redirect after some prompting by leading questions, Dicus explained that he left the meeting early and International Van Lines *might* have been mentioned at the meeting after he left.

Dicus said that on the morning of October 4 when he arrived at the picket line, the picketing was being conducted by two men with whom he was not acquainted. Present at approximately this time were employees Manual Vasquez, Sal Casillas, Robert Vasquez, and some other men with whom he was not acquainted. He explained that the Company had a large movement of office equipment planned for that day, so there were additional, casual workers ordered for this large office move.

It was stipulated by counsel for the parties that the picket signs carried by the men had at the top the word "Picket" and on the next line "Unfair to Teamsters Union Local 381." In addition to this uniform top portion of the picket sign, one picket sign had the added slogan, "No elections. Why." Another sign had the added slogan, "No contract." Another had the

added slogan, "Big money for attorneys nothing for us."

Robert L. McEwan, president and general manager of the Company, testified that on October 4, he received a phone call from Meador, the office manager, at approximately 6:45 a.m. Meador told him there were pickets out in front of their office and asked him to come right over. He was dressing at the time so hurried and arrived over at the office and asked Meador what it was all about. Meador said that he didn't know anything about it, so McEwen went out to talk to the pickets. At that time in the group there were four men present, who were known to him. They were Richard Dicus, Manuel Vasquez, Sal Casillas, and Robert Allen. He went across the street to the men and said, "We have a job to do. Are you going to go to work?" They said, "No, we don't have a contract. We cannot cross the picket line." He replied that he did not see how he could sign a contract when he had never been presented with one. One of the men asked, if he wanted them to get a contract and he replied, "Not at this time." He went back to his office and phoned the Federal Electric Company for whom his Company was to perform a big office move job that day. He explained his situation to Mr. Castle of Federal Electric Company and asked if he could have a day's delay in making the move. Castle replied that under the circumstances his company would be satisfied if the movement of their office was made on the following day.

### *The Strikers are Replaced*

McEwan testified without contradiction that having arranged the postponement with Federal Electric Company Meador and McEwan then tried to locate men locally to replace the strikers, so that the move



could be performed the next day. When they were unsuccessful in finding replacements from local sources, McEwan called his brother John R. McEwan, Jr., at Oxnard, California, and explained his plight to him. John said that under the circumstances he had some men that he thought he could make available to the Company. On the following morning, his brother supplied to him five men named Harold Mitchell, Gary Hoffman, Blaine Burlington and Ysmael (Easy) Contreras and Dan Cross. With the assistance of these men the Company was able to complete the move of the Federal Electric Company.

On October 5, the Company sent identical telegrams to Vasquez, Dicus, and Robert Vasquez, stating, "For failure to report for work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced." McEwan explained that the first employment of the men sent to him by his brother did not appear on the payroll records of the Company because he agreed with his brother to reimburse the brother for the time the men worked for him and for which the brother paid these men. In addition to the men obtained through his brother McEwan was able to hire other men to work for him from time to time as his business required. The Company was able to continue its operations in that fashion and the picketing was continuing at the time of the hearing herein.

#### *Robert L. McEwan's Illness*

It is undisputed that on April 8, 4 days after the work stoppage, Robert L. McEwan was hospitalized at Santa Maria for major surgery. He continued in the hospital until October 28 when he was discharged and went to Oxnard, California, for a period of approximately 1 week, to his mother's home for a



further period of convalescence. During the period that he was hospitalized and inactive his father, John R. McEwan, Sr., came to Santa Maria and gave what assistance he could to the business operations of the Company.

*The Alleged Interference, Restraint and Coercion*

The fact that there are four members of the McEwan family, involved in the events of this proceeding, to either a less or more extent, occasioned some confusion among McEwans at the hearing and it appears that the draftsman of the complaint in certain particulars mixed up these persons. At the hearing counsel for the General Counsel stated that the John R. McEwan, Jr., alleged to be an officer of the Company in paragraph V of the complaint, was not John G. McEwan (herein previously designated as Johnny McEwan) the son of Robert L. McEwan. After this statement without objection paragraph XII(a) was amended to read "by John G. McEwan" instead of "By John McEwan, Jr." This clarification eliminated from any allegations of coercive conduct, John McEwan, Jr., the officer of the Company who lives at Oxnard, California, and did not appear in the events taken place at Santa Maria, and John R. McEwan, Sr., who was a stand in for his son for a few weeks in the course of his son's hospitalization and convalescence and who testified most briefly in this proceeding. John R. McEwan, Sr., appeared on the witness stand only long enough to say that he never discussed union activities with any of the employees while he was at Santa Maria.

David Dicus, the son of Richard Dicus is the principal witness to the alleged unfair labor practices committed by Johnny McEwan. David Dicus is a young man who is a student at California Polytechnic

Institute, San Luis Obispo. Employee Robert Vasquez corroborated to some extent some of the testimony of David Dicus. It was during the cross-examination of Robert Vasquez, that it appeared that there had been a case of mistaken identity as to the McEwan who had held certain conversations with David Dicus. In the course of that cross-examination Vasquez said that the McEwan who had talked to him and Dicus was the son of Robert L. McEwan, a young man 16-17 years of age.

The testimony of David Dicus further clarified this by Smith, the former owner, he had a summer job as part-time employee with the Company. When David was asked what Johnny McEwan's position with the Company was, he said that Johnny was a "swamper, just like I was a swamper being a helper". David testified that in the first conversation that took place around September 1 that he was unloading a truck with Robert Vasquez and Jimmy Weaver, employees at the warehouse. David said that he did not know what lead up to the conversation but his testimony is as follows: Johnny said, "that if the Union did come in, that our fishing trips would be gone. We would never have any more, and that is about as good as I can remember on the conversation then." David said he did not know what provoked this conversation but, "John came out with that little statement, \* \* \*

David further testified that some three weeks later Johnny came to David's trailer-home to say good-bye to David because Johnny was going back to college in Missouri, and to help David sand an automobile which David owned preparatory to it being painted. While they were so engaged, the conversation veered to the subject of the Union. David said "something about the Union had "better medical plans." At that point Johnny "come up with a statement, his father

would handle the situation the same as he did or a friend of his did, in Virginia, that he would make it so hard on the workers it would make them want to quit. That is the whole conversation right there." In the course of further examination by the Trial Examiner David testified that this conversation arose while the boys were sanding David's car which "John's grandfather was going to paint" for David. The complaint alleges by three separate paragraphs that on October 2, Robert L. McEwan interrogated employees, threatened them with loss of economic benefits or reprisals because of union activity and promised employees promotions to supervisory positions if they refrained from becoming or remaining members of the Union.

In support of these allegations the General Counsel called as a witness Manuel Vasquez, an employee. Vasquez testified that about a week prior to October 4, he had a conversation with Robert L. McEwan in the warehouse of the Company. As to this conversation Vasquez testified as follows:

A. I was looking in the—some overseas shipment I was working, and Mr. McEwan walked up to me and asked me if I knew anything about this union business that was going on.

Q. Yes?

A. And told him that I did, and he asked me, "Well, are you going—are you fellows going to join?" I told him, "Yes", that I think we would. Well, it was not exactly the words he said, "Are you going to go along with it?" I told him, "Yes", I thought we would, and what did I mean by we would. And I told him that most of the guys working in the warehouse, that worked with me in the warehouse, employees of International and—

**TRIAL EXAMINER:** Go right along, what else was said?

**The WITNESS:** He says, he told me, you know he did not think that the union would be good for the company, and he said that he had heard that me and Dicus, me and Tex were the instigators. I told him that was not true, but that we were going to go along—I made the mistake if I said I was going to go along with the boys, and I told him that, you know, a lot of the companies in Santa Maria were paying real cheap wages, and that they had talked to me about going along with them. That was the fellow employees in different companies. And I told them I was going to go along with them and go with the Union. And he did not say nothing else, I don't think. He turned around and walked back in the office.

Manuel Vasquez also testified that on either October 2 or 3 he had a second conversation with Robert L. McEwan, in the latter's office. Vasquez testified that on this occasion he was in Meador's office and McEwan nodded with his head for him to come in. When he was in McEwan's office McEwan showed him some figures on a pad and told him approximately how much money the Company was going to make in a future period. McEwan then said, "that if the Company made any profit, that the money—the profit the company made would go to paying casual labor during the summer time, because the wages had been so high"—"If we did not join the Union, that the money could be distributed among the employees by having barbeques and picnics and parties and fishing trips."

After his attention was directed to the subject of a bonus by the General Counsel, Vasquez testified that McEwan also said that if the men joined the Union that they would lose the yearly bonus.

It's one of the oddities of this work stoppage that when Vasquez was asked if he went "on strike on October 4" Vasquez replied, "I don't know what you mean—I went out on strike. I reported for work." When he was asked if he worked he answered, in the negative and said that he did not cross the picket line.

When Robert L. McEwan was called as a witness on behalf of the Company he said that he had a conversation with Manuel Vasquez between September 21 and October 4 in regard to the Union. His version of the conversation was somewhat different from that furnished by Vasquez. McEwan said he made the statement that if the Union was to come into the Company's organization that the high rate of pay which would be paid to casual labor would take away from the profit situation of the Company. And if there were no profits the Company might not be able to pay Christmas bonuses or furnish the employees with fishing trips, barbeques and picnics. However, he also told him that whether the Union came in or not, if the corporation made a profit that the Company would give Christmas bonuses, fishing trips, barbeques and picnics, etc. In this connection it should be noted that A. J. Smith, the prior owner of the Company had on occasion given picnics, fishing trips or a bonus to the employees. In the short period of time, during which McEwan had owned the Company he had not set up any practice of procedure on bonuses, picnics, barbeques or fishing trips; his conduct of the business had not reached those matters.

Richard Dicus called as a witness by the General Counsel stated that the Company had promised him benefits and threatened reprisals in an attempt to influence him in his voting for a collective-bargaining representative. Dicus testified that on October 2 McEwan called Dicus into his office to talk to Thomas W.

Arruda, who was the labor relations consultant and trial counsel for the Company. Dicus testified that when he was seated Arruda said to him that McEwan had called him in, "to see if we cannot do something about these Union things that are going on, and we would like to know if you could give us some help." Dicus testified that then Arruda looked at some papers on his desk and said that there were five names signed on authorization cards that were eligible to vote in the election. Dicus, assuming that Arruda knew the names of the Union employees then told him that they were David Dicus, David Ponsetta, Robert Vasquez, Manuel Vasquez and himself. Arruda then said that he couldn't see how David Dicus, a summer employee and David Ponsetta who had worked only a few days could be eligible to vote. Then Arruda asked him how he felt about the "Union thing." Dicus said he could take it or leave it. Then Arruda said, "Bob and I have been talking it over, and we're thinking about making you the foreman and giving you a substantial raise in pay." Then Arruda said, "we would like to do something about this Mexican thing around here." Dicus said he would like the raise in pay but he would like to have the Union too, because the benefits of the Union were pretty good. Then Arruda said he was going to have just as good benefits without the Union as he would have with the Union and that Bob McEwan was working on an insurance proposition that Dicus was interested in. According to Dicus, Arruda closed the conversation by saying that he could not fulfill any of these promises, if the Union came, that it would be illegal. As he was leaving the office, Arruda said to Dicus, "well we can depend on you for a no vote, then". Dicus replied in the affirmative.

In the course of his testimony Robert L. McEwan testified that some time in August, Dicus came to him



and said that he was worried about his job, because Mexicans were taking over so much of the moving industry in the area. McEwan told Dicus not to worry, that McEwan was planning on making Dicus, either operation manager or foreman, as soon as he had the operations running smoothly. After the advent of the union organizational campaign, McEwan told Dicus during the first part of September that Arruda, his labor relations counselor had cautioned McEwan that he could not promote Dicus to the position of operations manager or foreman at that time because such a promotion might be considered an unfair labor practice designed to dissipate the Union's representational strength. According to McEwan, Dicus said that he didn't understand that, and asked if he could talk to Mr. Arruda the next time the labor relations consultant was in town. On October 2, Arruda visited the Company and at that time McEwan told Dicus that Arruda was in his office if Dicus wanted to talk to him. Dicus joined Arruda and McEwan in the office and said to Arruda that he understood that Arruda had said that he could not be promoted at that time, and Dicus asked why. Arruda explained that to promote him would be like trying to break the Union or dissipate its majority. Arruda said that the petition said that there were five employees. Dicus said that he knew who the men were who were adherents of the Union and started to name them, but Arruda stopped him saying, "I don't want to know who they are." Then Arruda explained that Dicus had a right to join the Union or to refrain from joining. Dicus replied that he didn't care whether the Union got in or not, but he thought that McEwan and he could sit down and work out an arrangement between themselves. Arruda told Dicus, that if the Union came in and McEwan still wanted to promote him, he could. But he



couldn't do it at that time, because it would look as though he was trying to take away the Union's majority. McEwan denied that Arruda asked Dicus how he was going to vote or that the words vote or voting were mentioned in the course of the conversation at any time. McEwan testified that he was in the office during the entire conversation and several times stopped Dicus from closing the door.

### *The Alleged Requests for Reinstatement*

At the hearing the General Counsel offered proof that, "during the month of October, both Vasquez and Dicus inquired of McEwan as to whether they would have their jobs *at the end of the strike.*" This short passage from the General Counsel's brief is quoted because the actual testimony seems to fall far short of an unconditional offer to call off the strike and an unconditional request for reinstatement. Richard Dicus testified that while McEwan was in the hospital he called at the hospital to see McEwan. In the course of the conversation with McEwan he asked if he was going to have a job or not. McEwan said that he did not know how the strike was going to turn out and he could not say, whether Dicus would have a job or not at that time. After McEwan left the hospital and was back at the warehouse of the Company, Dicus and his wife called on McEwan at the office. Again he, "asked Mr. McEwan if I was going to have a job, and he told me practically the same thing." McEwan said, "I don't know. I don't know how this thing is going to turn out—as far as I'm concerned, it is the principle of the thing." The General Counsel then asked Dicus if he was asking for his job back at that time or "after the strike was over." Dicus replied that at "this particular time I asked him after the strike was over."

Manuel Vasquez also testified that he went to the hospital to see McEwan on a Sunday. He told McEwan that the boys had talked about going back to work and they would like to know how he felt about it. McEwan told Vasquez that physically he was not in a position at that time to talk about their going back to work, that after he got a little better and he felt more like talking, that his door would always be open to any of the men who wanted to talk to him.

Richard Dicus testified further that around December 21, Manny Vasquez and himself went to the office to see if McEwan would give them their jobs back. Manny Vasquez asked McEwan if he would consider giving the men their jobs. McEwan replied that he could not do it. He said that he had men working for him that had stuck with him during his trouble and he just could not fire them to make room for the former employees. He asked them how they would feel if he put them back to work, and two or three weeks later fired them. McEwan said his door was always open to the men, but at that time he could not do it.

In the course of his testimony, McEwan said that at the time the various employees visited him at the hospital he was recovering from major surgery and was under the influence of sedatives; that he simply told the men that he was in no position to discuss anything concerning the operation of the Company at that time.

In addition to the verbal testimony, the General Counsel introduced certain documents which showed the payroll of the Company for weeks immediately prior to and after the initiation of the strike. These records demonstrate that no one worked on either October 4 or 5. From McEwan's testimony which is un-

contracted it is clear that his brother furnished him with 5 men who worked for a short period of time after the beginning of the strike and that thereafter McEwan made do with such men as he could hire in the locality.

It is undisputed that from October 4 until the date of the hearing the strike and picketting at the warehouse continued. On the day before the hearing a final effort was made by employees Vasquez and Dicus to confer with McEwan and settle the strike and arrange for a return of the men to their jobs. McEwan said that he would confer with his attorney on the situation and the employees offered to submit for consideration of McEwan, sample Teamster Contracts from Monterey or Sacramento. However, the hearing previously adjourned, took place as scheduled.

The testimony related above does not purport to be a summary of all testimony and all documentary evidence submitted and received at the hearing; it is merely a summary of the testimony of the principal witnesses for the parties which presents their contentions. All testimony, and all documents have been considered in reaching the conclusions hereafter stated, but some testimony of relatively lesser importance has not been narrated here in the interest of brevity.

#### CONCLUDING FINDINGS

As the reader must have noted the sequence of events leading to the principal issue here, the work stoppage, is undisputed. This evidence established beyond any possible doubt that the Union organized the employees of the Company, but did *not* demand recognition from the Company, or offer to prove to the Company its majority status by the presentation

of authorization cards or by any other means. The Union first chose to use the procedures of the Board to settle the question of representation, so it duly filed a petition for certification of representative with the Regional Office (Regional Office 31), Los Angeles. This conduct of the Union was in accord with the spirit and the hope of the Congress in passing the National Labor Relations Act, and the various amendments, whose purpose was and is to insure industrial and employment stability and harmonious labor relations conducted in accordance with law by collective bargaining, and not by "quickie" resorts to the use of economic force which the Congress on several occasions had found to be inimical to our national welfare.

However, the Union's reasoned course of action, was soon abandoned and in its place the Union, without demand or notice to the Company, initiated a work stoppage and picketing, and here we reach the crux of this proceeding. Why did the Union abandon the legal procedure of the Board and resort to its "quickie" work stoppage? Ben Sanders, the Union officer in charge of the organizational efforts of the Union testified that this action was taken for two reasons, (1) he had received hearsay information that the Company had *withdrawn* its *consent* to an election and (2) *some other* employers in the area had fired some union adherents. As to (1), the fact is undisputed that the Company had not consented to an election, and had *not* withdrawn any consent or withdrawn any action which could be described as purported consent. The Company, at that point was awaiting further action of the Regional Office in the Union-instituted proceed-

ing. At that point the Union ordered the work stoppage and picketing began.'

At this point, in my judgment the question must be raised, was this "quickie work stoppage," a *protected* activity under the Act? I am familiar with the line of cases which appear to hold that *all* concerted work stoppages, except those for a clearly illegal purpose, are protected under the Act, but in my judgment this case arising after 30 years of collective bargaining calls for a re-examination of this so-called blanket protection of work stoppages upon the fiction that they are *legal strikes*, either "economic" or "unfair labor practice" in nature.

To place this question in its proper focus let me say that "quickie strikes" which arise spontaneously because of an unfair labor practice committed by an employer, or because of unsafe, or unsanitary conditions developing on a job are, in my judgment, properly protected by the Board. But, the rationale pro-

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\* In passing it should be stated that in his testimony, Sanders after some leading questions, testified that he received his information concerning the withdrawal of consent from the Union's counsel, George A. Pappy, Esq., in a phone call to Mr. Pappy's office in Los Angeles, and that Mr. Pappy had received the information from "someone" in the Regional Office. I do not credit this testimony of Sanders. Mr. Pappy is an experienced labor counsel, and a former employee of the Regional Office. I have such confidence in Mr. Pappy's ability and integrity and in the ability and integrity of the personnel in the Regional Office, that this testimony proved to be utterly without factual foundation, cannot be credited. In my judgment, this bit of testimony is a fabrication by Sanders to give a semblance of excuse for his arbitrary and precipitate conduct in calling the work stoppage. I do not credit this attempt by Sanders to slough off the responsibility for his conduct on Mr. Pappy or Regional Office personnel.

tecting those strikes may not be stretched to this work stoppage without nullifying the intent of the Congress, in enacting and in amending the Act.

Most of the writers on this subject define a strike as a concerted withholding of their labor by a group of employees to exert economic pressure upon an employer with whom they have a labor dispute. Here, at the time of the work stoppage, there existed no labor dispute; the Union had not notified the Company of its claimed majority representative status; it had not demanded recognition and it had not been refused. At that point, no difference existed between the Union—employees and the Company. The Company waited, expecting the law as administered by the Regional Office to take its course.

At that point the Union called a work stoppage of *this* Company because allegedly (1) some *other* van line in the area had done something which the Union didn't like and (2) for the purpose of muscling its way to representative status by the use of economic force.\*

I do not believe that such conduct should receive the protection of the Act. Thirty years have passed since the passage of the Wagner Act, but even in that long time, we should not forget that it was a veritable plague of strikes, often caused by arbitrary, unreasoned and unreasoning action by employers and unions, that brought the Wagner Act into being to bring order out of chaos that threatened our national

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\*I have stated previously that I do not credit the testimony of Sanders as to the alleged withdrawal of consent to an election. In my judgment, the Union, through the Teamster officers, simply decided to abandon the Board's procedure and to muscle their way to representative status by economic force, *without displaying proof of majority status to either the Company or the Board.*



existence. Its purpose was to promote harmonious labor relations, and employment stability by the means of collective bargaining and the use of legal procedures, and thus displace the bull-headed intransigence which was the hallmark of many employers and union leaders of that era. Upon a consideration of the causes which brought the Act into being, and the clearly stated Congressional purpose in passing the Act, and its amendments, I cannot see how *this work stoppage* can be found to be a protected activity under the Act.

Support for this position is found in the decision of the Court of Appeals (C.A. 4) and of the Supreme Court in the *Washington Aluminum* case which states and answers the question here presented.\* In the cited case the employees of Washington Aluminum Co. walked off the job because the place of their employment was in their opinion "too cold." The Circuit Court noted that no notice to strike was given, and no complaint about the cold given to the Company before the strike. The Supreme Court found notice to strike in some individual complaints lodged with supervisors and excused the failure to give notice on the ground that the employees had no bargaining representative,—a deficiency not present here.

The reasoning of the Circuit Court in pertinent part is as follows:

There was some variation in the testimony of the employees as to the real reason for the walkout. But even if it be assumed their sole purpose was to protest the low temperature of their place of employment we do not believe their actions should be considered a protected

\* *Washington Aluminum Co.*, 291 Fed. 2nd 869, 48 LRRM 2528; reversed by U.S. Supreme Court 370 U.S. 9, 82 S. Ct. 1099, 50 LRRM 2235.



activity under the facts and circumstances here presented. One of the fundamental policies of the National Labor Relations Act, 29 U.S.C. § 151 (1958), is to secure industrial peace and prevent strife and disruption by encouraging negotiation and peaceful procedure for the attempted settlement of the demands of a party. That is not to say that employees may not under any circumstances, exert concerted pressure on their employer in their efforts to gain compliance with their demands. However, the office of a demand as a condition upon the use of concerted pressures is well recognized. As this court stated in *Jeffery-De Witt Insulator Co. v. NLRB*, 91 F.2d 134, 138, 1 LRRM 634 (4th Cir. 1937):

“\* \* \* A ‘strike’ in such common acceptance, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused.”

An important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer \* \* \*

The decision then cites *N.L.R.B. v. Ford Radio and Mica Corp.*, 258 Fed. 2nd 165, 42 LRRM 2620 (2nd Cir. 1958) to the following effect:

In *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457, 465, 42 LRRM 2620 (2nd Cir. 1958), the court said:

“The duty to bargain collectively is but a facet of the underlying purpose of the entire Act in promoting and encouraging the peaceful

settlement of labor disputes. Placing the activity here under the broad protection of section 7 would clearly frustrate that purpose. To hold that those engaging in a strike had an unfettered right to refuse not only to discuss their grievances but even to name them would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations. "The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right to collective bargaining for the purpose of preserving industrial peace." \* \* \*

"We do not hold as a matter of law that employees engaging in concerted activities must give formal or even informal notice of their purpose. However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they choose to remain silent, bear the risk of being discharged."

We believe this principle particularly applicable where, as here, the cause of the objectionable condition was largely fortuitous and substantially beyond the control of the employer and was of but brief duration, and where, even beyond the neglected opportunity for inquiry, negotiation and settlement, effective measures had been taken by the employer before the protest was even staged. The company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees.

The Supreme Court, Mr. Justice Black writing, reversed the Circuit Court on the following reasoning:

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the niggardly fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. *The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative* and, in fact no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the

same sort of gripes as the gripes made about the heat in the summertime." The bitter cold of January 5, however, finally brought these workers' individual complaints into concert so that some more effective action could be considered. *Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion* in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding *that they were not required to make any more specific demand than they did* to be entitled to the protection of § 7. [Emphasis in decision supplied by writer].

Upon a consideration of the lines of legal reasoning in these decisions I must hold that the Union-ordered work stoppage of October 4 was an unprotected activity. Here there was no spontaneous work stoppage and the men were represented by a collective-bargaining agent—a local of a national union. However, the collective-bargaining agent chose to proceed by the use of economic force, and acted in absolute derogation of the Act, which it had previously invoked; because of its displeasure with some other employer in the Santa Maria area.

However, the General Counsel contends that the Union's action of October 4 was a protected unfair

labor strike. It is not clear from her argument, what action of the Company was an unfair labor practice which caused or prolonged this alleged strike, and as I view the evidence there can be no doubt as to why this work stoppage occurred and why it has continued until the date of the hearing. On that point we have the questionable testimony of Sanders himself and the testimony of McEwan, which I credit, to the effect that the Company took no action against the Union or its adherents prior to the stoppage. I have examined the Company's conduct from every angle and I can perceive no element of unfair labor practice which caused or prolonged the work stoppage.

At best, for the General Counsel's purposes, this strike could be only an economic strike for the purpose of gaining recognition of representative status from—the Company. I recognize the fact that the Board may rationalize that transmittal of a copy of the Union's petition to the Company was by inference a demand for recognition and when the Company did not recognize the Union immediately, the Union's strike action was justified. Of course, such a finding would disregard those factors in the evidence previously enumerated, but in case that point may be reached by the Board, I will determine the rights of the so-called strikers to reinstatement.

On October 5, the Company sent Manuel Vasquez, Robert Vasquez, and Richard Dieus a telegram stating that "for failure to report for work as directed at 7 a.m. Wednesday, October 4, 1967 you are being permanently replaced." The testimony of McEwan which is uncontradicted and which I credit, establishes that on October 4, *he made arrangements with his brother for replacements of temporary duration and that hereafter he hired such men as the circumstance of the strike and the labor market afforded as permanent*

*replacements*. It has been held for many years on the highest authority that an employer has the right to replace economic strikers and continue his business despite the strike if he can.\* Therefore, I find that the action of the Company in replacing the economic strikers was not a discriminatory discharge as alleged in the complaint and was not an unfair labor practice.

At this point we may turn to a consideration of the rights of the replaced economic strikers to reinstatement to their jobs. Here, it is undisputed that the strike which began on October 4, 1967 continued until the date of the hearing on April 3, 4 and 11, 1968. The testimony of the employees themselves is clear on the question of reinstatement rights. Their first worry about their jobs was couched in the question, would they get their jobs back, *after the strike was over*. Up to the day before the hearing the employees, with the Union officials in the background, sought to induce McEwan to enter into a version of the Teamster contract *and* to reemploy the strikers. The law is clear on this point; if economic strikers call off or abandon their strike, and if they make an unconditional offer to return to work, they have a right to be reinstated in their former or equivalent positions, *if* the employer has not hired permanent replacements for the strikers or *if* the employer has an equivalent job open.

In this case, none of these conditions to reinstatement were ever fulfilled by the strikers, and the proof offered by the General Counsel is fatally defective, in that this transcript does not disclose that the Company had vacant jobs to which the strikers could have been reinstated. To enumerate these deficiencies; (1) the strikers never abandoned or called off their strike, but on the contrary continued it; (2) they made no

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\* *Mackay Radio and Telegraph Co., Inc.* 304 U.S. 333.



*unconditional* offer to return to work; (3) they had been permanently replaced and (4) there is no proof in this record that there were equivalent jobs open which could have been given to the strikers. Therefore, I find that the failure of the Company to reinstate the strikers was not an unfair labor practice as alleged in the complaint.

The complaint herein alleges that the Company violated Section 8(a)(1) of the Act, by specific conversations of certain individuals. One of these is Johnny McEwan, son of one of the stockholders of the Company. It is undisputed that this teenage college boy was a summer helper at the Company as was his friend, David Dicus, another college student. Johnny McEwan is the son of one of the owners of the Company and David Dicus is the son of Richard Dicus, a leading union adherent. These part-time, casual, summer-time employees are involved in this controversy, only by the accident of birth and filial loyalty. According to David Dicus, Johnny McEwan offered the opinion to his friend David that Johnny's father would work the men so hard they would quit. On another occasion as they sanded David's "hot rod," Johnny reiterated this statement. I do not think this expressed opinion of one college boy to his chum; both of whom are known to the employees as "helpers" of summer-time duration only, constitutes an unfair labor practice on the part of this Company. The General Counsel's claim that this opinion of Johnny McEwan binds the Company, based only on his relationship to his father, is, in reality an admission of just how insubstantial is the General Counsel's case.

There are other conversations alleged in the complaint to be violations of Section 8(a)(1) of the Act.



They involve a conflict in testimony between McEwan and employees Dicus and Vasquez. The differences in the testimony of the witnesses as to these conversations goes largely to their timing and the factual context in which the conversations occurred. Upon a consideration of all the evidence and the bearing and demeanor of these witnesses, I credit the versions of these conversations given by McEwan. His version of these conversations seems to be more consistent with the totality of the evidence and the undisputed sequence of events from the time the Company acquired the business from its former owner, until the time of the hearing. Furthermore, I can perceive no threat of force or economic reprisal in these conversations.

Therefore I find that the Company did not violate Section 8(a)(1) of the Act as alleged in the complaint.'

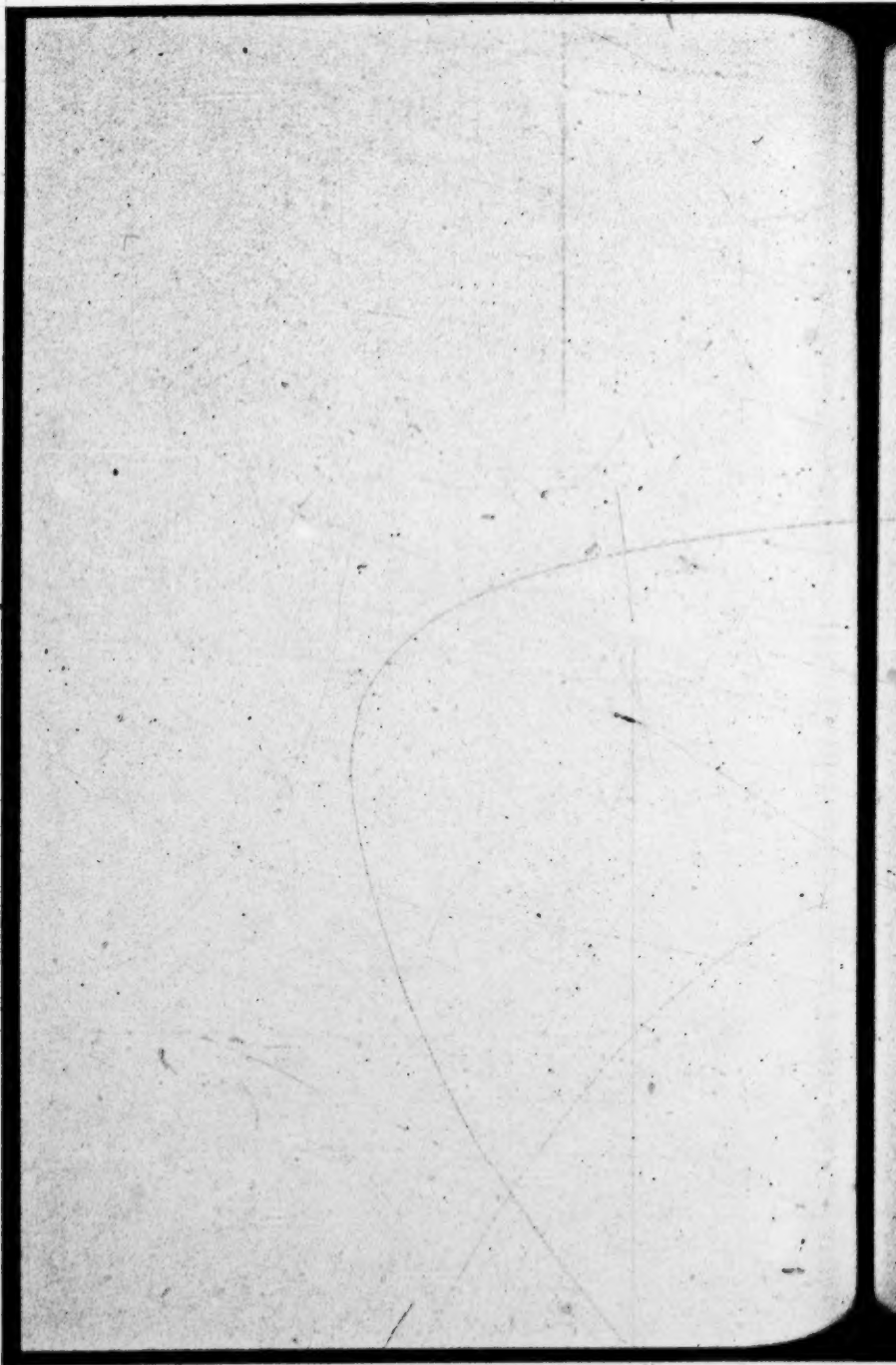
Upon a consideration of all the credible testimony and documents submitted in the case it is found that the General Counsel has failed to prove by a preponderance of the credible evidence that the Company committed any of the unfair labor practices alleged in the complaint, therefore it is ordered that the complaint herein is dismissed in its entirety.

Dated: February 20, 1968.

DAVID F. DOYLE,  
*Trial Examiner.*

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'Dierks Forests, Inc., (C.A. 8) 66 LRRM; 2581, 385 F.2d 48, and cases cited; *TRW-Semi-Conductors, Inc.*, 66 LRRM 2707; 385 F.2d 753.



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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

IN THE  
**Supreme Court of the United States**

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October Term, 1971  
No. 71-895

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

vs.

INTERNATIONAL VAN LINES,

*Respondent.*

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**Answer to Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Ninth Circuit.**

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International Van Lines (hereinafter referred to as Respondent) hereby answers the Petition of the National Labor Relations Board (hereinafter referred to as the "Board") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The Solicitor General filed a Petition for Certiorari in this case on behalf of the Board on January 10, 1972.

**Opinions Below.**

The opinion of the Court of Appeals (App. A, pp. 15-31)<sup>1</sup> is officially reported at 448 F.2d 905. The opinion of the Board (App. D, pp. 34-83) is reported at 177 NLRB 353.

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<sup>1</sup>For the convenience of the Court and in order to avoid duplication of the record, references to proceedings below are keyed to the Board's Petition for Certiorari. The term "App." shall refer to the Appendices to the Petition filed with this Court heretofore by the National Labor Relations Board.



### **Jurisdiction.**

The judgment of the Court of Appeals (App. B, p. 32) was entered on September 3, 1971. The Board's Petition for Rehearing *en banc* was denied on October 12, 1971 (App. C, p. 33). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **Questions Presented.**

In addition to the question presented by the Board's Petition to this Court, Respondent respectfully submits the following additional question:

Whether the protections of Section 7 of the National Labor Relations Act, as amended (hereinafter referred to as the "Act") (16 Stat. 136, 73 Stat. 519, U.S.C. Sections 151, *et seq.*), apply to strike activities of employees who without notice, strike their employer to compel recognition of a labor organization whose petition for representation, at the very time of the commencement of such strike, is under investigation and is being processed by the Board pursuant to its authority under Section 9 of the Act.

### **Statute Involved.**

The relevant provisions of the Act (*supra*) are as follows:

"SEC. 8. (a). It shall be an unfair labor practice for an employer—

\* \* \*

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be pro-

hibited from permitting employees to confer with him during working hours without loss of time or pay;

\* \* \*

"SEC. 9 (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has a reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

**Statement.**

**A. The Board's Findings of Fact.**

In late August, 1967, Teamsters Local 381 (hereinafter referred to as the "Union") commenced efforts to organize employees working for moving and storage companies, including Respondent, located in and around Santa Maria, California (App. D, pp. 36, 54). Although the Union's organizational activities were directed toward numerous employers, each employer was organized as a separate bargaining unit (App. D, pp. 54, 55).

A few days after the filing with the Board of a representation petition and service thereof on Respondent, the Union held meetings with the employees of the various moving and storage companies and a strike was initiated against Respondent and others on October 4, 1967 (App. D, pp. 36, 59). The purpose of the strike, as found by the Board, was either (1) to bring pressure on Respondent to agree to a consent election or (2) to bring pressure on Respondent to immediately recognize the Union (App. D, p. 39).

When Robert McEwan, Respondent's President, arrived at his place of business on the morning of October 4, 1967, he observed two pickets, neither of whom were employees of Respondent. Four of Respondent's employees who were across the street [App. D, pp. 58-60; Tr. 326-327] refused to come to work, saying to McEwan,

"\* \* \* we don't have a contract. We cannot cross the picket line." (App. D, p. 61).

On October 5, 1967, Respondent hired five employees who had been laid off by Mercury Van & Storage, a company operated by McEwan's brother in Oxnard, California, to handle a job originally scheduled for the previous day. The men were carried on the Mercury payroll until October 11, 1967 with the understanding that Respondent would reimburse Mercury for wages paid on its behalf [App. D, p. 61; Tr. 329-331, 348-351].

Also, on October 5, 1967, Respondent notified employees Manuel and Robert Vasquez and Richard Dicus by telegram that: "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967, you are being permanently replaced" (App. D, pp. 36-37).

Following the commencement of the strike and Respondent's October 5 telegram, Richard Dicus and Manuel Vasquez inquired of McEwan as to whether they would have their jobs at the end of the strike. The inquiries were made during October; however, no commitments were made by either McEwan or the employees [App. D, p. 69; Tr. 79-80].

In late November, 1967, Salvadore Casillas, a casual employee of Respondent who had declined to cross the October 4 picket line, asked McEwan to place him on Respondents "availability list" [App. D, p. 37; Tr. 343-344]. On or about December 12, 1967, Richard Dicus, Manuel and Robert Vasquez requested reinstatement by Respondent [Tr. 182-184].

On or about March 28 and 29, 1968, Manuel Vasquez visited McEwan and told him that if he would

sign a contract and put all the men back to work the strike could be settled. McEwan refused to sign the contract presented to him by Vasquez [Tr. 247-248, 249, 252, 258-259]. None of the above named employees were recalled by Respondent.

**B. The Board's Decision and Order Before the Court.**

The Board found that Respondent's employees who refused to report for work on October 4 had engaged in strike activity protected by Section 7 of the Act; that on October 4, 1967, said employees were economic strikers; that on October 5, 1967, said employees were discharged by Respondent "for not working, i.e., for engaging in a strike", and Respondent thereby violated Sections 8(a)(1) and 8(a)(3) of the Act; that said discharges had the natural effect of prolonging the strike and thereby converted the economic strike into an unfair labor practice strike; that accordingly Respondent further violated Sections 8(a)(1) and (3) of the Act by refusing to reinstate Manual and Robert Vasquez, Richard Dicus and Sal Casillas upon their unconditional applications therefor; and that on October 5, 1967, the Union represented a majority of Respondent's employees in an appropriate bargaining unit (App. D, pp. 39-42)." The Board thereupon ordered Respondent to reinstate the four named employees and to make them whole for any loss of pay resulting from the Respondent's unlawful action from the date of their unconditional applications for reinstatement. (App. D, p. 42).

### **BASIS FOR THE WRIT.**

(1) The Court of Appeals affirmed the Board's findings that Respondent's conduct in sending the telegram of October 5, 1967, before said employees had been permanently replaced, was in violation of Sections 8(a)(1) and (3) of the Act (App. A, p. 22). That Court, nevertheless declined to accept the Board's view that as a matter of law the aforesaid violation of the Act changed the status of those economic strikers to that of unfair labor practice strikers (App. A, pp. 26-27).

The reasoning of the Court below is set forth in a footnote to its discussion of that issue (App. A, pp. 27-28). That footnote has been omitted from the Board's extract of the Court's opinion, which appears on pages 8 and 9 of its Petition (App. A, pp. 27-28).

In essence, the Court of Appeals reasoned that the transition from economic to unfair labor practice striker occurs "only in those cases where the discharge of economic strikers constitutes a significant factor in the prolongation of the strike" (App. A, p. 27, note 5); and in this case, although the Board has made a finding to that effect, such finding is in the nature of a conclusion, which is unsupported by any evidence (App. A, p. 28). Accordingly, in the absence of a finding supported by substantial evidence that the discharge of economic strikers in violation of the Act, was a significant factor in prolonging the strike, the Court of Appeals held that the status of the discharged employees remained that of economic strikers (App. A, p. 28).<sup>2</sup>

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<sup>2</sup>See *NLRB v. James Thompson & Co.*, 208 F. 2d 743 (C.A. 2, 1953), where the employer committed unfair labor practices  
(This footnote is continued on next page)



(2) Notwithstanding the disagreement between the Court of Appeals and the Board as to whether the discharged employees have the reinstatement rights of economic or unfair labor practice strikers (the issue which the Board asks this Court to review), both the Board and the Court below were in agreement that the October 4, 1967 strike, or refusal to report to work, was concerted activity protected by Section 7 of the Act. It is that question to which Respondent will now address itself.

The decision of the Court below affirmed the finding by the Board that a strike to persuade an employer to consent to an election is concerted activity protected by Section 7 of the Act, notwithstanding the fact that the strike is called on the heels of the filing by the Union of a petition for a Board conducted election (App. A, p. 24). The Court did not pass upon the Board's alternative finding that "even if the purpose of the strike was to gain immediate recognition for the Union, rather than to merely force a consent election,

following the commencement of a strike that was economic at its inception. The Court there denied enforcement of a Board order calling for reinstatement and back pay for employees it classified as unfair labor practice strikers. Judge L. Hand, speaking for the Court, said at page 749:

"It is indeed theoretically possible that the subsequent practices might have prolonged the strike although respondent was not guilty for refusing recognition of the union; but there is not one syllable in the record that any one of the eleven supposed unfair practices (thirteen less two) kept it going a day longer than the refusal to deal with the union did. That was the grievance on which the employees went out, and there is not the least likelihood that, as soon as the respondent should have changed its position on that, the strikers would not have returned at once regardless of anything else that had happened after October fourth."

See also *NLRB v. Frick Company*, 397 F. 2d 956 (C.A. 3, 1968).



the strike was lawful, even absent a prior demand for recognition . . ." (App. A, p. 24, note 4). In failing to pass upon the "recognition" issue, the Court below, at the very least, created further uncertainty in an already uncertain but critical area of labor law. More likely, however, the decision of the Court of Appeals concurring in the overall finding that the strike was protected activity, will be cited for that proposition alone by the Board, future parties and commentators, as judicial approval of the Board's rationale on the recognition issue.

If either of the objectives of the strike (consent or recognition) were unlawful, then the strike itself must be so characterized. The analogy to be drawn from the secondary boycott cases (*NLRB v. Denver Bldg. Trades Council*, 1951, 341 U.S. 675) supports this conclusion. Furthermore, there is no way from a reading of the Board's decision to limit that decision to the consent issue. On the contrary, the Board has embraced both objectives and has declared them to be equally protected by Section 7 of the Act. (App. D, pp. 39-40). In support of its position, the Board cites *Philanz Oldsmobile Inc.*, 137 NLRB 867, 969; and *New Orleans Roosevelt Corp.*, 132 NLRB 248. Neither case is in point on the recognition issue. Both cases deal with picketing to persuade an employer to consent to an election. Neither the Court of Appeals nor the Board below cite any authority in support of the Board's position on the recognition issue.

To sanction the strike as protected activity in the instant case is to encourage the use of economic muscle by a union in derogation of the procedures provided by Congress to determine the collective bargaining representative status.

The right of employees to strike, however fundamental, is not unbridled. The so-called sitdown strike, where strikers remain on the employer's premises during the strike, taking possession of his property and excluding others from entry, has been condemned. *NLRB v. Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240.

A strike conducted by a minority of a bargaining unit without authorization of the majority has been held to be activity not protected by Section 7 of the Act. *Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805 v. NLRB*, 312 F. 2d 108 (C.A. 2, 1963).

Strikers guilty of violence have never been accorded the protections of the Act. *NLRB v. Fansteel Metallurgical Corp.*, *supra*.

Employees who refuse to work overtime or to perform certain tasks while accepting others in order to bring economic pressure on their employer to force him to accede to their demands have been denied the protections of the Act. *NLRB v. Valley City Furniture Co.*, 1954, 110 NLRB 1589, *enforcing*, 230 F.2d 947 (C.A. 6, 1956); *Montgomery Ward & Co.*, 1945, 64 NLRB 432, *enforcement denied*, 157 F. 2d 486 (C.A. 8, 1946).

In *American News Co., Inc.*, 1944, 55 NLRB 1302, the Board, after some prodding by this Court in *Southern Steamship Co. v. NLRB*, 1942, 316 U.S. 31, 47 that a strike to compel an employer to violate the Federal Stabilization Act of 1942, was not concerted activity protected by Section 7 of the Act, and recognized the principle that:

"\* \* \* the Board has not been commissioned to effectuate the policies of the Labor Relations

Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

In *Thompson Products, Inc.*, 1947, 72 NLRB 886, the Board extended the *American News Co., Inc.*, *supra*, reasoning and held that a strike by employees to compel their employer to violate the Board certification of another union was conduct not protected by the Act.

In his dissent to this Court's opinion in *United Mine Workers v. Arkansas Oak Floor Co.*, 1956, 351 U.S. 62, which set aside a ruling of a Louisiana State Court enjoining peaceful recognitional picketing by a union which had failed to file with the Secretary of Labor the financial and other data required by Sections 9(f) and (g) of the Act, and had failed to file with the Board the non-Communist affidavits required by Section 9(h), Justice Frankfurter noted that:

"A noncomplying union, such as the petitioner, however vigorously it may assert noncompliance as a matter of principle, is not under condemnation of illegality by the Taft-Hartley Act, or any other federal law, from employing economic pressure to achieve its goal. *The explicit consequence which that Act attaches to noncompliance is that such a union is denied the advantages of the National Labor Relations Board; it cannot utilize that Board's machinery to obtain certification as the*

bargaining representative or to secure redress against unfair labor practices by an employer." (emphasis supplied).

In the instant case, Respondent does not question the right to strike under the attendant circumstances. Respondent's contention, simply stated, is that if a union and the employees supporting it, after petitioning the Board for an election, choose to disregard the Board's processes and rely upon the strike as a means to gain recognition, they should not be allowed thereafter to use the Board's processes to seek redress from conduct of the employer which was the proximate result of their acts in derogation of the Board's election process.

The Board in its decision in this case relied heavily on the opinion of this Court in *NLRB v. Washington Aluminum*, 1962, 370 U.S. 9, as support for its broad application of Section 7 to the concerted activities in question (App. D, p. 40). The Trial Examiner's analysis of *NLRB v. Washington Aluminum*, *supra*, with which Respondent concurs, distinguishes that case from the instant case based upon the absence of a bargaining representative *Washington Aluminum* (App. D, pp. 78-79). The spontaneous work stoppage in *Washington Aluminum* was engaged in by seven employees who were wholly unorganized. The Court said at 370 U.S. 9, 10:

"Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the Company, the men took the most direct course to let the company know that they wanted a warmer place to work."

A spontaneous work stoppage by unrepresented employees to protest a grievance over working conditions

is a far cry from a strike, called without notice or demand, to force an employer to forego election procedures established by Federal law. The Trial Examiner's comments on this point are worthy of consideration.

"I do not believe that such conduct should receive the protection of the Act. Thirty years have passed since the passage of the Wagner Act, but even in that long time, we should not forget that it was a veritable plague of strikes, often caused by arbitrary, unreasoned and unreasoning action by employers and unions, that brought the Wagner Act into being to bring order out of chaos that threatened our national existence. Its purpose was to promote harmonious labor relations, and employment stability by the means of collective bargaining and the use of legal procedures, and thus displace the bull-headed intransigence which was the hallmark of many employers and union leaders of that era. Upon a consideration of the causes which brought the Act into being, and the clearly stated Congressional purpose in passing the Act, and its amendments, I cannot see how *this work stoppage* can be found to be a protected activity under the Act." (App. D, pp. 74-75).

This Court, in *Boys Market, Inc. v. Retail Clerks*, 1970, 398 U.S. 235, speaking through Justice Brennan, recognized the transition that has occurred in labor-management relations during the thirty-odd years since the enactment of the Norris-LaGuardia Act, 47 Stat. 70 (1932), and the Wagner Act, 49 Stat. 449 (1935, as amended, 29 U.S.C. 151, *et seq.*) and stated at 238:

"As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor



movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones."

The *Boy's Market* decision reversed *Sinclair Refining Co. v. Atkinson*, 1962, 370 U.S. 195, and reflected a national labor policy which favors judicial enforcement by injunction of contractual provisions for resolution of disputes by arbitration with a collateral no strike clause, as opposed to the prior concept that the right to engage in peaceful picketing is inviolate.

The same policy considerations upon which the reversal of *Sinclair* was predicated should apply with equal force to the case at bench. The protections embodied in Section 7 of the Act should not embrace employees who strike their employer to compel recognition of a labor organization whose petition for representation is pending before the Board pursuant to its authority under Section 9 of the Act.

If permitted to stand, the combined effect of the decisions of the Court and Board below will be an open invitation to employees and unions to disregard the orderly processes of the Board in the most critical area—determination of a collective bargaining representative—and to resort to the strike at the very time the Board is investigating the basis for the petition for representation. Should the Board's decision in this respect be left undisturbed, employers will be faced with

the choice, in many cases, of suffering the economic loss attendant to a prolonged strike, or to avoid such loss, of recognizing a union which may not in truth or fact represent a majority of the employees in an appropriate bargaining unit. This latter course of action, which, on the one hand may be the only practical alternative; on the other hand will constitute a violation by the employer of Section 8(a)(2) of the Act, as an incursion against the employees' freedom of choice guaranteed by Section 7 of the Act. *Empire State Sugar Co. v. NLRB*, 401 F. 2d 559 (C.A. 1, 1968); *NLRB v. Midtown Service Co.*, 425 F. 2d 665 (C.A. 2, 1970).

**Conclusion.**

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted as to the question presented by Respondent and denied as to the question presented by the Board.

Respectfully submitted,

LOUIS R. GARCIA,

*Attorney for Respondent.*

*Of Counsel:*

GOLDSTEIN, GENTILE & KIRSHMAN,



**the Supreme Court of the United States**

**OCTOBER TERM, 1971**

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**No. 71-895**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**INTERNATIONAL VAN LINES**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

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**REPLY MEMORANDUM FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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Respondent has filed an "Answer" which, in addition to opposing the petition for a writ of certiorari, raises another issue: whether employees who strike to compel their employer to recognize a union while a petition to determine its representative status is pending before the Board are entitled to the protection of Section 7 of the National Labor Relations Act (pp. 13-15).

It is unclear whether respondent intends this document to be a cross-petition for a writ of certiorari.

Since the court of appeals decided this issue against the respondent, it could raise the point only by itself filing such a cross-petition and not in its answer to the Board's petition. See *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 431-432; *Alaska Industrial Board v. Chugach Ass'n*, 358 U.S. 320, 325; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191; *LeTulle v. Scofield*, 308 U.S. 415, 421-422. If the answer be viewed as a cross-petition, it is untimely. It was filed on February 7, 1972. This was 157 days after September 3, 1971, when the judgment of the court of appeals was entered, and 118 days after October 12, 1971, when the court denied the Board's petition for rehearing (which did not involve the issue which respondent seeks to raise). No extension of time for filing a cross-petition was obtained, and the Answer was filed long after the 90-day period for petitioning prescribed in 28 U.S.C. 2101(c) expired.

In any event, the issue respondent seeks to raise is not presented on the record. For the court of appeals held that the purpose of the strike was not, as respondent contends, to compel the employer to recognize the union, but "to pressure the Company into holding a consent election" (Pet. App. 23).

Accordingly, the Court should grant the petition limited to the question presented by the Board.

Respectfully submitted.

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*Solicitor General.*

PETER G. NASH,  
*General Counsel,*  
*National Labor Relations Board.*

FEBRUARY 1972.

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## Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1971**

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**No. 71-895**

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**INTERNATIONAL VAN LINES**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 15-31)<sup>1</sup> is reported at 448 F. 2d 905. The decision and order of the National Labor Relations Board (Pet. App. 34-83) are reported at 177 NLRB 353.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 33) was entered on September 3, 1971, and the Board's timely petition for rehearing *en banc* was denied on October 12, 1971 (Pet. App. 33). The petition for

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<sup>1</sup>"Pet. App." refers to the appendix to the petition for certiorari. "A." refers to the separate appendix to the briefs.

a writ of certiorari was filed on January 10, 1972, and was granted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether employees engaged in an economic strike who are discharged for that activity before they have been permanently replaced and then continue to strike have an unconditional right to be reinstated to their former jobs.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

#### SECTION 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, \* \* \*

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual



aid or protection, and shall also have the right to refrain from any or all of such activities  
\* \* \*

SECTION 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \* \* \*

\* \* \* \* \*

SECTION 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

#### STATEMENT

##### A. THE BOARD'S FINDINGS OF FACT

In August 1967, Teamsters and Warehousemen, Local 381 (the "Union"), began an organizing drive among the employees of the approximately ten moving van and storage companies located in the Santa Maria, California area, including International Van Lines (the "Company") (Pet. App. 36, 54). On September 21, the Union, having obtained authorization cards from five of the Company's six full-time employees,<sup>1</sup> filed a representation petition with the Board's

<sup>1</sup> The Company hires additional employees on a casual or part-time basis as its needs warrant (A. 13-15).

Regional Office. A copy of the petition was sent to the Company and was received on September 25 (Pet. App. 36, 55, 56).

On October 2 and 3, the Union held meetings of the employees of the various moving van and storage companies in the area. At the meeting on October 2, Union Representative Ben Sanders stated that he had heard that some van lines, including the Company, had withdrawn their consent to an election, but he wanted to check the story out (Pet. App. 21, 57; A. 7-8). At another meeting, the next day, Sanders announced that he had "checked with our legal counsel and found that International Van Lines and other van lines \* \* \* had withdrawn their consent for an election" (A. 8). On the basis of Sander's announcement, the employees decided to strike (Pet. App. 39, n. 7; A. 9, 27). The strike began at the Company on October 4, with pickets carrying signs bearing the legends "Unfair to Teamsters Local 381," "No Elections. Why," and "No Contract" (Pet. App. 36, 59-60; A. 31).

That morning, when the president of the Company, Robert McEwan, arrived at the Company's warehouse and saw the pickets, he attempted to persuade his employees to come to work.\* The employees who were present—including Richard Dicus, Manuel Vasquez, and Salvador Casillas—refused, stating: "\* \* \* we don't have a contract. We cannot cross the picket line." (Pet. App. 58-60; A. 38.) Robert Vasquez also

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\* Although the pickets at the warehouse were not employees of the Company, some of its employees were grouped in front of the warehouse (Pet. App. 59; A. 38).

did not report to work that day because of the picketing (Pet. App. 61). Unable to obtain replacements for his employees locally, McEwan postponed a job scheduled for that day and arranged with his brother, who operated another moving company—Mercury Van & Storage—at Oxnard, California, to obtain several employees whom his brother was in the process of laying off (Pet. App. 60-61; A. 40).

On October 5, three employees who had been laid off by Mercury (Mitchell, Hoffman and Burlington) and two others who had been obtained by McEwan's brother (including Contreras) worked for the Company (Pet. App. 61; A. 40, 46-48). These persons were carried on Mercury's payroll for their work that day (A. 40-41) and did not appear on the Company's payroll for the remainder of that pay period, which ended on October 11 (Pet. App. 37, n. 4; A. 65-67).<sup>\*</sup> Also on October 5, the Company notified employees Manuel and Robert Vasquez and Richard Dieus by telegram: "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967, you are being permanently replaced" (Pet. App. 36-37; A. 57-59).

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<sup>\*</sup> Thereafter, Contreras appeared on the Company's payroll only for the periods ending October 18 and October 25, and Burlington appeared only for the period ending October 25. Hoffman did not appear on the payroll until the period ending October 25. There is no evidence that Mitchell performed any further work for the Company (Pet. App. 37, n. 4; A. 68-69). Robert McEwan continued to operate his business during the strike by hiring from time to time such other men as his needs required (Pet. App. 71).

Between October 8 and October 28, Dicus called on McEwan, who was in the hospital, and asked if he was going to have a job, but McEwan refused to commit himself (Pet. App. 69; A. 17, 42). Manuel Vasquez also visited McEwan in the hospital to inquire about going back to work, but he too received no commitment (Pet. App. 70; A. 30). Shortly after McEwan left the hospital on October 28, Dicus went to his office and again asked if he was going to have a job. McEwan replied that he did not know and that it was "the principle of the thing" (Pet. App. 69; A. 17-18). In the latter part of November, Salvador Casillas went to McEwan's office and told him that he could no longer stay out on strike since, unlike the other men, he did not have a wife who worked. He asked to be placed on an "availability list" (Pet. App. 37; A. 46). He was never called to work (A. 46).

About December 12, Richard Dicus, Manuel Vasquez, and Robert Vasquez went to President McEwan's office and asked to be reinstated to their former jobs. McEwan replied: "No, I cannot do it, I got men working for me that stuck by me through all this thing, and I just cannot go out there and fire them" (Pet. App. 37-38, 70; A. 18-19, 22-23, 29-30). He added: "How would you guys feel if I put you back to work, and two or three weeks from now do the same thing to you?" (A. 19).

#### B. THE BOARD'S DECISION AND ORDER

The Board found that the Company's employees had engaged in a strike to compel the Company to agree to a consent election, but that, even if the ob-

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ect of the strike was (as the trial examiner had found) to compel the Company to grant immediate recognition to the Union, it was nonetheless protected by Section 7 of the Act (Pet. App. 39-40); that the Company's telegrams of October 5 in effect discharged employees Manuel and Robert Vasquez and Richard Picus for engaging in the strike; and that, since these employees had not been permanently replaced at that time, the Company's action violated Section 8(a)(3) and (1) of the Act (Pet. App. 40-41). The Board also found that the unlawful discharges tended to prolong the strike, thereby converting "what had commenced as an economic walkout into an unfair labor practice strike"; accordingly it held that the Company further violated Section 8(a)(3) and (1) by refusing to reinstate, upon their unconditional applications, the three employees discharged by the telegrams, and Salvador Masillas (Pet. App. 41). The Board ordered the Company to reinstate the four employees and to make them whole, from the date of their unconditional applications for reinstatement, for any loss of pay resulting from the Company's unlawful action (Pet. App. 42).'

The Board also found that the Company violated Section 8(a)(1) of the Act by threatening its employees with loss of benefits if they chose union representation (Pet. App. 35-36). The court below held that substantial evidence did not support its finding (Pet. App. 16-21), and the Board does not contest that portion of the court's decision here.

Finally, the Board found that a majority of the employees had signed authorization cards and that the Company's unfair labor practices "could only have had the effect of destroying conditions needed for a fair election," and ordered the Com-

## C. THE DECISION OF THE COURT OF APPEALS

The court of appeals found that the purpose of the strike was to induce the Company to hold a consent election, that this objective was protected by Section 7 of the Act, and that the employees were thus engaged in a lawful economic strike (Pet. App. 23-24).<sup>\*</sup> The court sustained the Board's finding that the Company had discharged Manuel and Robert Vasquez and Richard Dicus for striking and refusing to cross the picket line before they had been permanently replaced, and had thereby violated Section 8(a)(3) and (1) of the Act (Pet. App. 25). The court also found that, although Casillas did not receive a telegram, he was discharged for the same reason and under the same circumstances, and thus his discharge similarly violated Section 8(a)(3) and (1) (Pet. App. 22). The court, however, declined to enforce the reinstatement provisions of the Board's order.

In the court's view, the reinstatement provisions were dependent on a finding that the four employees became unfair labor practice strikers at the moment they were discharged. The court rejected that conclusion. It stated (Pet. App. 27) :

pany to bargain with the Union upon request (Pet. App. 41-42, 43). The court below did not reach this aspect of the case (Pet. App. 31). Accordingly, if this Court reverses the judgment below with respect to the reinstatement rights of the affected employees, the case must be remanded to the court of appeals for a determination of the propriety of the bargaining order.

<sup>\*</sup>The court found it unnecessary to reach the question whether the strike would have been protected had its purpose been "to gain immediate recognition for the Union, rather than merely to force a consent election" (Pet. App. 24, n. 4).

\* \* \* The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between the economic-striker-reinstatement rule [*National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333] and the unfair-labor-practice-striker-reinstatement rule [*Mastro Plastics v. National Labor Relations Board*, 350 U.S. 270] in cases like this one. \* \* \*

[Footnote omitted.]

Accordingly, the court held that the four employees were economic strikers when discharged and would not be entitled to reinstatement if the Company could show "legitimate and substantial business justifications" for refusing to reinstate them (Pet. App. 28).

The court therefore remanded the case to the Board for further findings on the Company's reasons for failing to reinstate the four strikers (Pet. App. 28-29). In addition, the court found that the circumstances surrounding the refusal to reinstate Casillas were ambiguous and directed the Board to clarify that matter (Pet. App. 29-31).'

'The court noted that Casillas, unlike the other three employees, was a "casual" worker, who worked for the Company



## SUMMARY OF ARGUMENT

Decisions under the Act have distinguished between employees who strike over economic objectives and those who strike to protest the unfair labor practices of an employer. The former are entitled to reinstatement unless the employer can show "legitimate and substantial business justifications" for the failure to do so, such as the continued presence of permanent replacements in the strikers' jobs. The latter, however, are entitled to reinstatement unconditionally, even though it may be necessary as a result to discharge permanent replacements hired during the strike. It is further settled that the discharge of economic strikers for strike absences before they have been permanently replaced violates Section 8(a)(3) and (1) of the Act. For such action constitutes discrimination against, and interference with, protected strike activity.

Here, the court of appeals upheld the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging four employees who were engaged in a protected economic strike before they were permanently replaced. However, the court refused to enforce the traditional reinstatement remedy ordered by the Board, holding that the unlawfully discharged employees were entitled only to the conditional reinstatement rights of economic strikers. The court erred on two grounds.

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only when summoned for a specific job. The court concluded that it was unclear whether McEwan decline to restore Casillas to the availability list or, if he had been restored, whether there was work for which he should have been called (Pet. App. 29-30).

First, wholly apart from whether the four discharges became unfair labor practice strikers, the Company, because of its action in unlawfully discharging them, had an unconditional obligation to reinstate them. As this Court has noted, "[r]einstatement is the conventional correction for discriminatory discharges." *Phelps Dodge Corp v. National Labor Relations Board*, 313 U.S. 177, 187. Employees who are discriminatorily discharged while on strike, no less than working employees who are unlawfully discharged, can be made whole only if they are offered immediate reinstatement to their former jobs.

Second, contrary to the court below, the Board properly found that the four discharges became unfair labor practice strikers. Thus, since the four employees continued to strike after their unlawful discharge, it is reasonable to conclude that they were then protesting not only the original grievance but also the subsequent unfair labor practice against them. Consequently, they became entitled to unconditional reinstatement for that reason alone.

The ruling of the court below would greatly enlarge the risks to which economic strikers have heretofore been subject. Moreover, it results in the anomaly that strikers who are unlawfully discharged are accorded less protection under the Act than are fellow strikers who are later discharged for protesting the initial discharges.

There is no merit to the Company's contention that the strike was unprotected by Section 7 of the Act, and therefore the Company could discharge the employees

with impunity. Substantial evidence supports the finding of the Board and court below that the strike was for the purpose of securing a consent election—clearly a protected objective. But even if the strike's objective were solely to gain immediate recognition of the Union, as the Company contends, the strike would not be unlawful or against public policy.

#### ARGUMENT

#### I

**ECONOMIC STRIKERS WHO ARE DISCHARGED FOR STRIKING BEFORE THEY HAVE BEEN PERMANENTLY REPLACED HAVE AN UNCONDITIONAL RIGHT TO REINSTATEMENT**

Decisions under the National Labor Relations Act have consistently distinguished between employees who strike over economic objectives and those who strike to protest the unfair labor practices of an employer. The former are entitled to reinstatement unless the employer can show "legitimate and substantial business justifications" for the failure to do so, such as the continued presence of permanent replacements in the strikers' jobs. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-347; *National Labor Relations Board v. Fleetwood Trailer Co.*, 389 U.S. 375, 378. The latter, however, are entitled to reinstatement unconditionally, even though it may be necessary as a result to discharge permanent replacements hired during the strike. *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 278; *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2).

The reason for the distinction is that, where employees have elected to strike for economic reasons, the employer, while he cannot discriminate against them for striking, has a legitimate interest in seeking to operate his business notwithstanding the strike, even to the extent of obtaining permanent replacements for the strikers. But, where the employees are striking because of the employer's unfair labor practices, there is no countervailing legitimate employer interest; unless the strikers are reinstated unconditionally at the end of the strike, they would be penalized for having taken action to protect themselves against the employer's wrongdoing.

It is further settled that the discharge of economic strikers for strike absences before they have been permanently replaced violates Section 8(a)(3) and (1) of the Act. For such action constitutes discrimination against, and interference with, strike activity which is not counterbalanced by any valid business justification. See *National Labor Relations Board v. United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818, enforcing, 96 NLRB 1108, 1112; *National Labor Relations Board v. Comfort, Inc.*, 365 F. 2d 867, 874 (C.A. 8), enforcing, 152 NLRB 1074, 1077-1079; *National Labor Relations Board v. Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9), enforcing, 88 NLRB 1262, 1268; *National Labor Relations Board v. Buzza-Cardozo*, 205 F. 2d 889, 890-891 (C.A. 9), enforcing, 97 NLRB 1342, 1344; *National Labor Relations Board v. Cowles Publishing Co.*, 214 F. 2d 708, 710-711 (C.A. 9), certi-

orari denied, 348 U.S. 876, enforcing, 106 NLRB 801, 802-803.

The court below in this case, though finding that Richard Dicus, Manuel and Robert Vasquez, and Salvador Casillas were discharged while engaged in a lawful economic strike and before they had been permanently replaced, and that thus their discharges violated Section 8(a)(3) and (1), nonetheless concluded that they were entitled to no more than the qualified reinstatement rights of economic strikers. That is, they could be denied reinstatement if the Company had a "legitimate and substantial business justifications" for doing so (Pet. App. 28). In the court's view, the four economic strikers would acquire an unconditional right to reinstatement only if it could be shown that their unlawful discharges converted them into unfair labor practice strikers. The court concluded that no such showing could be made here, since at the time of their discharges they were protesting only the original grievance (Pet. App. 27). This reasoning is erroneous on two grounds.

First, whether or not the four discharged employees became unfair labor practice strikers, they were entitled to unconditional reinstatement solely on account of the fact that their discharges were unlawful.<sup>4</sup> As this Court has noted, "[r]einstatement is the conventional correction for discriminatory discharges"; "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have

<sup>4</sup> Under Section 2(3) of the Act, 29 U.S.C. 152(3), a wrongfully discharged employee retains his status as an "employee" entitled to the protection of the Act.

obtained but for the illegal discrimination." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 187, 194; see also Section 10(c) of the Act, 29 U.S.C. 160(c). When an employee is unlawfully discharged while on strike and before he has been replaced, he is wrongfully deprived of a job to which, at the time of the discharge, he is otherwise entitled to return. A reasonable means of eradicating the effects of this unlawful action is to require the employer to offer the striker reinstatement to his former job whether or not a replacement was hired after the discharge. Accordingly, the courts of appeals, including the court below, have consistently enforced Board orders requiring such offers of reinstatement to employees unlawfully discharged while participating in an economic strike. See cases cited *supra*, pp. 13-14. See also *Bonnar-Vawter, Inc. v. National Labor Relations Board*, 289 F. 2d 133 (C.A. 1).<sup>\*</sup>

Second, the Board properly found that the four dischargees became unfair labor practice strikers. It is true, as the court below noted, that at the time of their

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<sup>\*</sup> Thus, even if the four strikers in this case had ceased striking at the moment of their discharge so that they never became unfair labor practice strikers, they would nevertheless have been entitled to offers of reinstatement. However, where employees continue striking after their unlawful discharge, the Board does not award backpay from the date of their discharge, but only from the date that they may have indicated a desire to abandon the strike. In the Board's view, absent such indication, it cannot be determined whether the loss of wages is attributable to the discharges or to the strike. See *Sea-Way Distributing, Inc.*, 143 NLRB 460; *Buzza-Cardozo*, 97 NLRB 1342, 1344-1345, enforced, 205 F. 2d 889 (C.A. 9).

discharges the four employees were protesting only the original grievance (Pet. App. 27). However, since the employees continued to strike after their unlawful discharge, it is reasonable to conclude that they were then protesting not only the original grievance but also the subsequent unfair labor practice against them. Certainly, they were as likely to be protesting that unfair labor practice as were any strikers subsequently discharged, whom the court concedes "might legitimately be considered unfair labor practice strikers" (*ibid.*). Accordingly, by continuing to strike after their unlawful discharge, the four strikers were entitled to unconditional reinstatement not only because their discharge was unlawful, but for the additional reason that they became unfair labor practice strikers. See *National Labor Relations Board v. Remington Rand, Inc.*, 130 F. 2d 919, 928, n. 8 (C.A. 2); *National Labor Relations Board v. Frick Co.*, 397 F. 2d 956, 964 (C.A. 3); *General Teamsters Local Union No. 992 v. National Labor Relations Board*, 427 F. 2d 582, 587, (C.A.D.C.).

Contrary to the misgivings of the court below, a holding that the four discharges had become unfair labor practice strikers would not eliminate the distinction between the reinstatement rights of economic strikers and the reinstatement rights of unfair labor practice strikers. Nor would it mean that discharged economic strikers automatically become unfair labor practice strikers when an economic strike is thereafter converted into an unfair labor practice strike (Pet. App. 27, and n. 5). The strikers here were not dis-



charged for cause, but in violation of Section 8(a)(3) and (1) of the Act. Only in these circumstances does it necessarily follow that, by continuing to strike, the dischargees have added their own grievances to the original economic basis for a strike and thus have become unfair labor practice strikers.<sup>10</sup>

The ruling of the court of appeals would greatly enlarge the risks to which economic strikers have heretofore been subject. Under the court's holding, once employees go out on strike, their employer can discriminatorily discharge union leaders or others whom he disfavors and avoid an obligation to reinstate them by later establishing that, after the discharge and before the employees offered to return to work, he had hired permanent replacements for them. Under settled law, the employer could not similarly minimize his reinstatement obligation with respect to employees unlawfully discharged while working; to allow him to do so during an economic strike would inevitably limit

<sup>10</sup> *National Labor Relations Board v. James Thompson & Co.*, 208 F. 2d 743 (C.A. 2), cited by the court below (Pet. App. 28, n. 5), is distinguishable. There, the employer did not unlawfully discharge economic strikers. The question, rather, was whether an economic strike over the employer's failure to recognize the union was "prolonged," and thereby converted into an unfair labor practice strike, by the employer's action in promising and granting a wage increase in violation of Section 8(a)(1) of the Act. The court merely held that it was unlikely that these violations of Section 8(a)(1) would have caused the employees to remain out on strike had the employer "changed its position" on "the grievance on which the employees went out", 208 F. 2d at 749. Here, on the other hand, it is clear that the four dischargees were ready to come back to work, but were prevented from doing so because they had been unlawfully discharged (see *supra*, p. 6).

the employees' willingness to engage in such protected activity. Moreover, the court's holding results in the anomaly that strikers who are unlawfully discharged are accorded less protection under the Act than are fellow strikers who are later discharged for protesting the initial discharges. Congress could hardly have intended such an irrational result.

## II

### THE STRIKE CONSTITUTED ACTIVITY PROTECTED BY SECTION 7 OF THE ACT

In its answer to our petition for a writ of certiorari in this case, the Company contended that the strike did not constitute activity protected by Section 7 of the Act, since a petition to determine the Union's representative status was pending before the Board at the time of the strike (Answer, pp. 2, 8-15). As we pointed out in our reply memorandum to the answer, the question whether the strike constituted protected activity is not properly before this Court, since the court below sustained the Board's finding that the strike was protected and the Company did not timely file a petition or cross-petition for certiorari in this Court. In any event, there is no merit to the Company's contention.

As we have noted (*supra*, pp. 6-7), the Board found that the employees had engaged in a strike to bring pressure on the Company to agree to a consent election (Pet. App. 39). The court of appeals sustained the finding and agreed with the Board that, in view of such an object, the strike was lawful notwithstanding

the fact that a representation petition was pending before the Board (Pet. App. 24). See *New Orleans Roosevelt Corp.*, 132 NLRB 248; *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 869.

The record supports the finding of the Board that the picketing and the strike at the Company's warehouse started in order to force a consent election.<sup>11</sup> As the court of appeals pointed out: "Fabrication or not, it is undisputed that [Union agent] Sanders told the men assembled at the Union meeting that the Company had consented to an election and had then reneged. Nothing in the record suggests that the men believed otherwise, or had reason to believe otherwise" (Pet. App. 23). And, upon receiving Sanders' information, the employees concluded: "[W]ell, they don't want to consent to an election. We are going to go on strike \* \* \*" (A. 27). Although other issues may later have arisen during the lengthy strike,<sup>12</sup> its

<sup>11</sup> The Company conceded in its brief before the court of appeals that, at least at its inception (when the four discharges occurred), the purpose of the strike was to force a consent election. The Company stated (Br. 32) that, "[v]iewing the totality of the evidence, it appears beyond question that the Union caused the picketing in the first place to force a consent election; that as the picketing matured the object became not merely recognition, but agreement to a standard industry-type contract; and that no conduct short of the signing of such a contract would have ended the strike."

<sup>12</sup> On March 28, 1968, Manuel Vasquez and Richard Dicus approached President McEwan to see if a settlement could be reached which would end the strike (A. 32-33). McEwan said that he would have to consult his attorney (A. 33-34). Later the same day, Vasquez and Dicus saw Arley Moore, a representative of another company, and asked if Moore could talk with some of the employers in the area in order to find a solu-

avowed objective when the employees were discharged on the second day was to secure a consent election; with such an objective, the strike was lawful.

Finally, even if the Union's objective was to secure recognition despite the pendency of an election petition, the Board correctly concluded as an alternative basis for upholding the legality of the strike that the Union's activity was protected by Section 7 (Pet. App. 39-40).<sup>14</sup> Since a Board certification is not the only means of establishing representative status, it is settled that, where, as here, a majority of the employees have signed authorization cards for the union, a strike and picketing for recognition are lawful. *United Mine Workers v. Arkansas Oak Flooring*, 351 U.S. 62, 75; *Philanz Oldsmobile, Inc., supra*, 137 NLRB at 868-869. Although Congress has regulated such picketing under certain circumstances in Section 8(b)(7) of the Act, 29 U.S.C. 158(b)(7), recognition picketing is not proscribed where a petition for a representation election has been filed. To the contrary, under Section 8(b)(7)(C),<sup>15</sup> such picketing cannot be

tion to the strike. Moore agreed to do so (A. 32-33). Subsequently, Dicus and Vasquez again conferred with McEwan to see if he would sign a contract and thereby settle the continuing strike, but no agreement was reached (A. 34-35).

<sup>14</sup> The court of appeals did not pass on this alternate ground for sustaining the strike (see Pet. App. 24, n. 4).

<sup>15</sup> This Section provides, *inter alia*, that:

"It shall be an unfair labor practice for a labor organization or its agents—

"(7) to picket or cause to be picketed, \* \* \* any employer where an object thereof is forcing or requiring an employer to

conducted for more than 30 days *unless* the union has filed a representation petition. See *Leather Goods Union v. Compton*, 292 F. 2d 313, 317 (C.A. 1); *Dayton Typographical Union v. National Labor Relations Board*, 326 F. 2d 634, 636 (C.A.D.C.). Accordingly, by coupling its picketing for recognition with the filing of a representation petition, the Union merely complied with the statutory requirements for preserving the legality of the picketing.

#### CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed insofar as it denies enforcement of the provisions of the Board's order (Pet. App. 46) requiring that Richard Dieus, Manuel and

recognize or bargain with a labor organization as the representative of his employees \* \* \*

“(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: \* \* \*.”

Robert Vasquez, and Salvador Casillas be reinstated with back pay."

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

SAMUEL HUNTINGTON,  
*Assistant to the Solicitor General.*

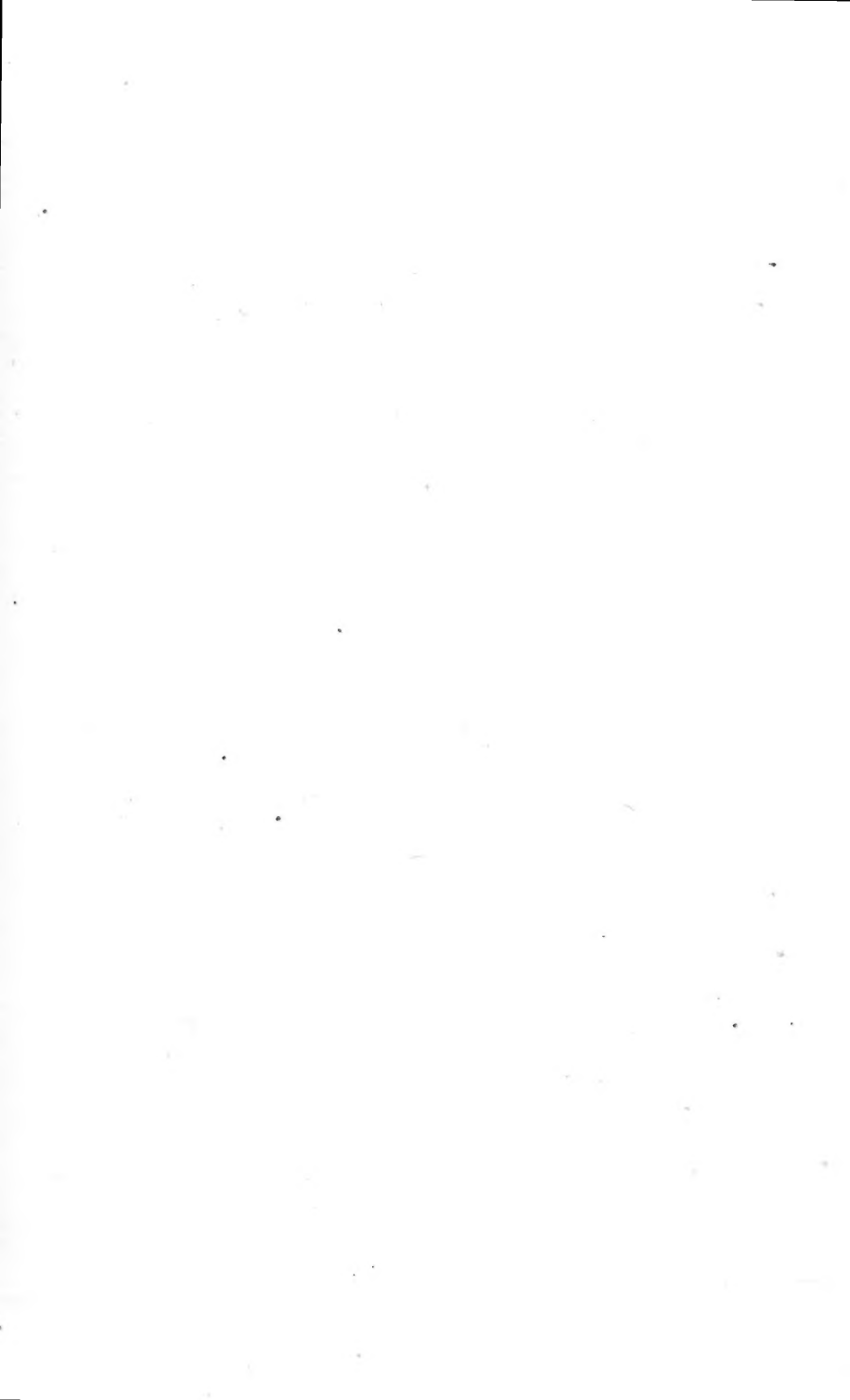
PETER G. NASH,  
*General Counsel,*

NORTON J. COME,  
*Assistant General Counsel,*

LINDA SHER,  
*Attorney,*  
*National Labor Relations Board.*

MAY 1972.

"The Board noted in its opinion (Pet. App. 42) that the record does not clearly establish whether Casillas was a part-time or full-time employee and, accordingly, left resolution of his status and entitlement to back pay benefits to the compliance stage of the proceeding. While the Board did find that Casillas made an unconditional application for reinstatement in November 1967 (Pet. App. 37, n. 5), his entitlement to back pay after that time, if in fact he was a part-time employee, would depend upon a determination that there was work for which he should have been called.







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# Supreme Court of the United States

October Term, 1971

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No. 71-895

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

INTERNATIONAL VAN LINES.

---

ON [REDACTED] A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

---

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus*, in support of the position of the National Labor Relations Board is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

### ARGUMENT

1. In form, the decision below appears to respect the well-settled doctrine that the discriminatory discharge of an employee engaged in a lawful strike violates §§ 8(a)(1)&(3)

of the National Labor Relations Act; in substance, however, the decision saps that doctrine's vitality by the severe limitation it imposes on the National Labor Relations Board's remedial power to cure such violations.

The Court of Appeals "affirmed" the Board's finding that the Employer committed a core violation of the Act: viz., the discriminatory discharge of four striking employees "in order to punish [them] for taking part in the strike." Pet. App. 25. See also, e.g., *NLRB v. Remington Rand, Inc.*, 130 F.2d 919, 927-928 (C.A. 2); *NLRB v. United States Cold Storage Co.*, 203 F.2d 924, 927 (C.A. 5), cert. denied, 346 U.S. 818; *NLRB v. Comfort, Inc.*, 365 F.2d 874 (C.A. 8); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 750 (C.A. 9). The Board, in conformity with its established practice approved in the decisions just cited, concluded that the appropriate remedy for this unfair labor practice was reinstatement with back pay from the point the discriminatees offered to return to work. Pet. App. 42. The court below, however, disagreed. On the remedial issue it held that striker-discriminatees are entitled to reinstatement only where the company does not have some "legitimate and substantial business justification," for not reinstating them. Pet. App. 28.

This holding is an invitation to employers to rid themselves of union activists through precisely the conduct §§8(a)(1)&(3) were intended to forbid. It permits an employer to single out strike leaders for discharge, secure in the knowledge that if he then hires replacements for the discriminatees the sole remedy for his unfair labor practice will be the slap on the wrist of a "cease and desist" order; an order that does nothing to repair the situation of the

discriminatees, and which for that reason provides no reassurance to other employees who are contemplating the exercise of their right to engage in concerted activities.

(a) The Act is designed to promote "collective bargaining with the right to strike at its core." *Bus Employees v. Missouri*, 374 U.S. 74, 82. The right to strike is central to the statutory scheme because "a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221. For the right to utilize "economic force [is] a 'prime motive power for agreements in free collective bargaining'." *NLRB v. Insurance Agents International*, 361 U.S. 477, 489. Thus "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." *Id.* at 495. The legitimacy of the use of the strike weapon flows from the fact that "it was recognized from the beginning that agreement might in some cases be impossible [in labor-management disputes] and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103-104. Since our system of free collective bargaining does not countenance "government control of the results of negotiation" (*NLRB v. Insurance Agents International*, 361 U.S. 477, 490), and does not provide for "compulsory arbitration, . . . the strike has been the ultimate sanction of the union" (*Railway Employees v. Florida E.C.R. Co.*, 384 U.S. 238, 244). In the final analysis the strike, and allied economic weapons, are all that em-

employees possess to improve their working conditions; employers are under no statutory duty to treat their workers fairly and "the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak." *H. K. Porter*, 397 U.S. at 109.

Because of its central role Congress has shown "repeated solicitude for the right to strike." *Erie Resistor*, 373 U.S. at 234. As Mr. Justice White explained therein (*Id.* at 233, footnotes omitted):

"Section 7 guarantees and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, HR Rep No. 245, 80th Cong, 1st Sess, 26, include the right to strike. Under § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities, *Radio Officers Union, etc. v. NLRB*, 347 U.S. 17, 39, 40, such as a legitimate strike. *NLRB v. Wheeling Pipe Line, Inc.* (C.A. 8) 229 F.2d 391; *Republic Steel Corp. v. NLRB* (C.A. 3) 114 F.2d 820. Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, HR Conf Rep No. 510, 80th Cong, 1st Sess. 59, and § 2(3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike. S Rep No. 573, 74th Cong, 1st Sess 6."

In short, under § 2(3) "strikers remain employees for the purpose of the Act and [are] protected against the unfair labor practices denounced by it." *NLRB v. Mackay Radio*



*& Telegraph Co.*, 304 U.S. 333, 345. Congress's purpose in providing this protection was to grant striking employees an "immunity" against improper discharges which "would or might have a deterrent effect on other employees." *NLRB v. Burnup & Sims*, 379 U.S. 21, 23. As the Fourth Circuit explained in *NLRB v. Industrial Cotton Mills*, 208 F.2d 87, 91 (C.A. 4), *cert. denied*, 347 U.S. 935, which was followed in *Burnup & Sims*, 379 U.S. at 22:

"Congress has, in no uncertain terms, very carefully safeguarded the exercise by employees of concerted activities and has expressly recognized their right to strike . . . [This] statutory protection . . . is a firm and clear guarantee . . .

The right to reinstatement granted to a blameless unreplaced striker [and to a striker-discriminatee or unfair labor practice striker whether replaced or not] is designed to set the limit of the risk he runs by striking. That limit . . . should not be unduly extended."

(b) As already noted (pp. 2-5 *supra*) the decision below invalidates the "clear and firm guarantee" (*Industrial Cotton Mills*, 208 F.2d at 91) of "immunity" (*Burnup & Sims*, 379 U.S. at 23) from discriminatory discharges that Congress provided to strikers. It grants employers leave to commit §§ 8(a)(1)&(3) violations free of the obligation to reinstate the striker-discriminatees. This, of course, greatly enlarges the risk Congress attached to participation in protected concerted activity. The Court of Appeals reached this result on the ground that requiring reinstatement here "would eliminate the distinction between the economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics v. NLRB*, 350 U.S. 270, 278) in

cases like this one." Pet. App. 27.

The Court of Appeals was, of course, correct in recognizing a distinction between the reinstatement rights of economic strikers and unfair labor strikers. Its error lay in its excessively narrow view of the rights of economic strikers. For this Court's opinion in *Mackay* demonstrates that economic strikers who are the victims of discriminatory treatment in violation of §§ 8(a)(1)&(3) are, by reason of their status as discriminatees, entitled to reinstatement as the remedy for the employer's unfair labor practice without regard to whether they have been replaced.

In *Mackay*, 304 U.S. at 345-346, the Court first noted that:

"[I]t [was not] an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment in order to create places for them."

But it then went on to state (*id.* at 346) :

"[T]he claim put forward [here] is that the unfair labor practice indulged by the [employer] was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by § 8."

And on the subject of the proper remedy for illegal discrimination during a strike the Court squarely held (*id.* at 348):

"The relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. On the basis of the findings, five men who took part in the strike, were discriminated against in connection with a blanket offer to reinstate striking employees. The Board enjoined further discrimination against employees by reason of union affiliation but it could not grant complete relief in respect of the five men short of ordering that the discrimination be neutralized by their being given their former positions and reimbursed for the loss due to their lack of employment consequent upon [their employer's] discrimination."

From this holding that a striker who is discriminated against when he applies for work is entitled to reinstatement even though that may require displacement of other employees, it follows, *a fortiori*, that a striker who is discriminatorily discharged is also entitled to reinstatement. For the discriminatory discharge of a striker is an anticipatory refusal to reinstate. It is an action which announces, contrary to the injunction of § 2(3), that the employer refuses to recognize the striker's continuing status as an employee.

The right to hire permanent replacements for economic strikers, in other words, is a shield which allows an employer, "guilty of no act denounced by the statute . . . to protect and continue his business" in the face of a strike for better terms and conditions of employment (*Mackay*, 304 U.S. at 345-346); it is not a sword which allows an

employer to punish his employees for having engaged in concerted activity protected by § 7. For *Mackay* teaches that a striker-discriminatee, no less than the discriminatee discharged while working at his job (see, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46, 47-48) is entitled to reinstatement without regard to whether he has been replaced. In both instances the question posed is "what is the proper remedy for a violation of §§ 8(a)(1)&(3)?" And the answer is the one given in *Mackay* and reaffirmed in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-188, 194:

"Reinstatement is the conventional correction for discriminatory discharges . . . It could not be seriously denied that to require discrimination in hiring or firing to be 'neutralized,' *National Labor Relations Bd. v. Mackay Radio & Teleg. Co.*, 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an 'affirmative action' which 'will effectuate the policies of this Act.'

According to the experience revealed by the Board's decisions, the effectuation of [the] important policy . . . of the maintenance and promotion of industrial peace . . . generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."

Indeed the provision of a lesser right to reinstatement to a striker-discriminatee than to other discriminatees would stand the Act on its head. The loss of his job is the most serious sanction that can be inflicted upon an em-

ployee. Thus a discriminatee who is not granted reinstatement has been denied an effective remedy for the wrong done to him. In light of Congress's "repeated solicitude for the right to strike" (*Erie Resistor*, 373 U.S. at 234) it would be anomalous, to say the very least, if the Act were read to grant all discriminatees, other than striker-discriminatees, the "complete relief" necessary to "neutralize" the employer's §§ 8(a)(1)&(3) violation (*Mackay*, 304 U.S. at 348). And as *Mackay* shows, that is not the way this Court has read the Act.

The distinction between the right to reinstatement of replaced economic strikers and striker-discriminatees lies in the fact that the former are not the victims of any unfair labor practice. As to them, the employer retains his common law right to refuse employment for any business reason, including the reason that their jobs have been filled by another. But an employer forfeits his right to hire and fire as he sees fit when he violates §§ 8(a)(1)&(3) of the Act. At that point his right to run his business is subordinated to the remedial purposes of the Act. As this Court stated in *Mackay*, 304 U.S. at 348:

"We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *National Labor Relations Bd v. Jones & L. Steel Corp.*, 301 U.S. 1, 48. The Board's order there sustained required the reinstatement of discharged employees. The requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employee in the case of

a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision."

In short, it is only in determining whether an act not motivated by anti-union animus is an unfair labor practice that considerations of "business justification" come into play. This is plain not only from *Jones & Laughlin* and *Mackay*, but on the face of the opinion in *NLRB v. Fleetwood Trailer*, 389 U.S. 375, the case relied upon by the court below. Pet. App. 28. The critical sentence in that decision is that "Unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications' he is *guilty of an unfair labor practice*, *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34." *Fleetwood Trailer*, 389 U.S. at 378; emphasis supplied. Thus, *Fleetwood Trailer* does not speak to the remedial question presented here at all. The precedent in point is *Mackay* and it requires affirmance of the Board order of reinstatement for the four striker-discriminatees.

2. In the instant case the Employer committed not simply one unfair labor practice that required a remedial order of reinstatement but two. The first was the discriminatory discharges of employees Robert and Manuel Vasquez, Richard Dicus and Salvadore Casillas discussed above. The second, to which we turn now, was the refusal to honor the four discharged employees' request for reinstatement at a time when they were unfair labor practice strikers.

(a) The law is, as the Court of Appeals acknowledged, that "Unfair labor practice strikers are entitled upon re-



quest to reinstatement with back pay, even if the employer has in the meantime hired permanent replacements. See *Mastro Plastics Corp. v. NLRB*, 1956, 350 U.S. 270, 278." Pet. App. 26. The Act safeguards this "unconditional" right to reinstatement where the employer is "guilty of an unfair labor practice" (*Remington Rand*, 130 F.2d at 928) because "failure of the Board to sustain the right to strike against . . . illegal . . . conduct would seriously undermine the primary objectives of the Labor Act. See *N.L.R.B. v. International Rice Milling Co.* 341 US 665, 673." (*Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278). As Judge Learned Hand stated in the leading case of *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 871 (C.A. 2), *cert. denied*, 304 U.S. 576:

"The act expressly preserves the right to strike, section 13, 29 U.S.C.A. § 163, and that includes a strike for [an unlawful refusal] to negotiate as well as any other. It is a remedy parallel with recourse to the Labor Board; its use, when unsuccessful, but in a controversy where the men are right, ought not therefore to be prejudicial to them. Moreover—and this is conclusive—the remedy which the act provides expressly includes restatement as a part of it."

Thus an unfair labor practice strike, to use Judge Hand's words, is a strike "at least one cause" of which is a § 8(a) violation. *Remington Rand*, 94 F.2d at 872. Following accepted principles that violation is a "tort—a 'subtraction' [and] it rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune." *Ibid.* And as Judge Hand added in the second *Remington Rand* case (130 F.2d at 928, n. 8):



"[W]here a strike which initially involved no unfair labor practice is prolonged or aggravated by an employer's unfair labor practice, the same rule applies as where the strike is the *result* of an unfair labor practice, and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike."

(b) On October 4, 1967 the Company's employees struck for the purpose of "pressur[ing] the Company into holding a consent election." Pet. App. 21-22, 23. On October 5, 1967 the Employer unlawfully discharged employees Robert and Manuel Vasquez, Dicus and Casillas. Pet. App. 22, 25. These discharges added a new element to the dispute. For, on and after October 8, 1967 the strikers sought not merely an election but their reinstatement. Indeed, as shown by the repeated visits of the discriminatees to Company President McEwan to discuss their employment status, the reinstatement issue became a major factor in the strike. Pet. App. 69, 70. The Board, therefore, found that "the discharge of the [four] employees, which had the natural effect of tending to prolong the strike, converted what had commenced as an economic walkout into an unfair labor strike." Pet. App. 26, 41.

In light of the principles discussed above, that finding was plainly correct. The question of whether the employer would, as required by § 2(3) of the Act, recognize the strikers as his employees, was a principle subject of contention. Where there had been one source of disagreement before (the holding of a consent election) there were now two (the election and the employee status of the strikers), and the second went to the strikers' most vital interest—their very

right to a job. Thus, it is manifest that the unfair labor practice committed here "aggravated" the strike. *Remington Rand*, 130 F.2d at 928. Indeed, the instant case is precisely parallel to *Remington Rand*. For, there as here, the employer "by its immediate discharge of the strikers and attempted abnegation of the employment relationship, was guilty of an unfair labor practice." *Ibid*. Moreover, there can be no doubt that the unfair labor practice "prolonged" the strike. The employees offered to return to work but the Employer refused to accept their application for reinstatement because it no longer regarded them as its employees. Pet. App. 37-38. Thus, under the accepted test (compare Pet. App. 26) on and after October 5, 1967 the strike in question here was an unfair labor practice strike.

(c) The Court of Appeals reasoned that:

"The strikers whose discharges constituted the unfair labor practice were, at the time of their discharge, protesting only the original [economic] grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between the economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics*) in cases like this one." Pet. App. 27.

In other words, the premise of the decision below is that unlawfully discharged economic strikers are frozen by their

discharge in their status as economic strikers subject to permanent replacement, and cannot be considered unfair labor practice strikers even though that discharge converts the strike into an unfair labor practice strike, and even though the striker-discriminatees continue to participate in the strike after it has been thus transformed.

But this theory assigns an unwarranted consequence to the discriminatory discharges. The Court of Appeals viewed the situation presented here as analogous to that presented in *NLRB v. Frick Co.*, 397 F.2d 956 (C.A. 3). See Pet. App. 28. In *Frick*, 397 F.2d at 956, the Third Circuit held that strikers permanently replaced prior to the time an economic strike was converted into an unfair labor practice strike were not entitled to the status of unfair labor practice strikers.<sup>1</sup> That holding, however, does not, as the court below supposed, mean that strikers who have not been permanently replaced prior to the time a strike is converted into an unfair labor practice strike continue thereafter to be subject to the risk of permanent replacement. As the Third Circuit specifically noted (397 F.2d at 964), "the policy underlying the remedy of reinstatement [for unfair labor practice strikers] is that an employer who engages in

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<sup>1</sup> While *Frick* does not treat with the point, the rationale of *Fleetwood Trailer* establishes that if an economic striker's permanent replacement vacates his job after the strike has become an unfair labor practice strike, the striker would, at that point, be entitled to the status of an unfair labor practice striker. For "if and when a job for which a striker is qualified becomes available, he is entitled to an offer of reinstatement." *Fleetwood Trailer*, 389 U.S. at 381. And during an unfair labor practice strike that entitlement to reinstatement is "unconditional." *Remington Rand* 130 F.2d at 928. Thus the striker would have precedence over any subsequent replacement.

unfair labor practices, and not the strikers, should suffer the consequences if the strike should be prolonged by the unfair labor practice," and it ordered reinstatement for "any striker who had not been replaced as of" the date the strike became an unfair labor practice strike (*ibid.*).

Thus, "the limit of the risk an employee runs by striking (*Industrial Cotton Mills*, 208 F.2d at 91) is permanent replacement during an economic strike. The purpose of the *Remington Rand-Mastro Plastics* doctrine is to lift that risk from his shoulders at the point at which an economic strike is converted into an unfair labor practice strike. And, of course, the discriminatory discharge of an economic striker cannot operate to increase that risk. Because it is a violation of §§ 8(a)(1)&(3) such a discharge is a legal nullity which can not defeat a striker's right to replacement guaranteed by the Act.

In short, prior to their discharge the striker-discriminatees in the instant case stood in precisely the same position as any other unreplaced economic striker. Their discharge did not reduce their position or impose any legal disability upon them. But it did serve to convert an economic strike into an unfair labor practice. After it had done so, a subsequent permanent replacement could not defeat the striker-discriminatees "unconditional" right to reinstatement (*Remington Rand*, 130 F.2d at 928), any more than permanent replacement could defeat the right of any other previously unreplaced striker taking part in an unfair labor practice strike. Thus, the Employer's refusal to reinstate them when they applied for their jobs after the strike had been converted into an unfair labor

strike was an additional violation of §§ 8 (a)(1)&(3) for which reinstatement is the proper remedy under *Mastro Plastics*.<sup>9</sup>

<sup>9</sup> In its Answer to the Petition for *Conorari* the Employer sought to raise the contention that the strike was unprotected activity since its purpose was to require immediate recognition while a petition for a representation election was pending. This contention is not open on this record. For the Court of Appeals held that the purpose of the strike was not to compel immediate recognition but "to pressure the company into holding a consent election." Pet App. 23. And the Employer apparently concedes, as it must (Pet. App. 23), that a strike for that purpose is protected by § 7.

Moreover this defense is without substance. The Board was clearly correct when it held (Pet. App. 39-40):

"There is nothing unlawful or against public policy in employees striking for . . . immediate recognition . . . when no other union has been certified.<sup>10</sup> Moreover, the strike does not lose the protection of the Act merely because the Union did not present beforehand a specific demand upon the Respondent for recognition. The Supreme Court, has stated unequivocally that the language of Section 7 is 'broad enough to protect concerted activities whether they take place before, after, or at the same time' a demand is made.<sup>11</sup> Nor are we here concerned with the reasonableness of or the justification for the decision to strike. It is settled law that the wisdom or unwisdom of a strike, the justification or lack of it, does not alter its status as a protected activity.<sup>12</sup>

<sup>10</sup> *Philans Oldsmobile, Inc.*, [137 NLRB 867,] 869.

<sup>11</sup> *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 14. However, prior to striking the Union had, as previously indicated, filed a petition limited to Respondent's employees, and copies of such petition had been served upon the Respondent which thus knew the Union claimed to represent its employees.

<sup>12</sup> *N.L.R.B. v. MacKay Radio and Telegraph Co., Inc.*, 304 U.S. 333, 344."

Indeed, while the Board law is confused, compare *Wilder Mfg.*

## CONCLUSION

The judgment of the court below should be reversed insofar as it denies enforcement of the provisions of the Na-

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Co., 185 NLRB No. 76, with *Linden Lumber Division*, 190 NLRB No. 116, under this Court's decisions, a majority strike for recognition is not simply concerted activity but "a remedy parallel with recourse to the Labor Board" (*Remington Rand* 94 F.2d at 871), for a refusal to bargain in violation of § 8(a) (5). For, as stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-597:

"A union [seeking recognition] is not limited to a Board election . . . , for, in addition to §9, the present Act provides in §8(a)(5) (29 U.S.C. §158(a)(5) (1964 ed.)), as did the Wagner Act in §8(5), that "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)," Since §9(a), in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support." Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as a winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of §8(a)(5)—by showing convincing support, for instance, by a union-called strike . . .

We have consistently accepted this interpretation of the Wagner Act and the present Act . . . See e.g., *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318, 339-340 (1940); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1943); *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62 (1956). Thus, in *United Mine Workers*, *supra*, we noted that . . . "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial



tional Labor Relations Board's order requiring that Richard Dicus, Manuel and Robert Vasquez, and Salvador Oasillas be reinstated with back pay.

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Respectfully submitted,

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of recognition of the union would have violated §8(a)(5) of the Act." 351 U.S. at 69."

Thus, while *Gissel* leaves open the question of the extent to which an employer may "reject a card-based bargaining request" (395 U.S. at 601, n.18), it squarely reaffirms the proposition that an employer violates the Act when he refuses to recognize a union which has proved its "majority support" by the "convincing evidence" of a successful recognition strike. The Employer's argument therefore provides him no protection; instead it demonstrates the existence of a further ground for the conclusion that the strike here was an unfair labor practice strike.







ORIGINAL

FILED

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MICHAEL ROYAL, JR., CLERK

**IN THE  
Supreme Court of the United States**

October Term, 1971

No. 71-895

**NATIONAL LABOR RELATIONS BOARD,**

*Petitioner,*

*vs.*

**INTERNATIONAL VAN LINES,**

*Respondent.*

**On Writ of Certiorari to the United States Court  
of Appeals for the Ninth Circuit.**

**BRIEF FOR RESPONDENT.**

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IN THE  
**Supreme Court of the United States**

October Term, 1971  
No. 71-895

**NATIONAL LABOR RELATIONS BOARD,**

*Petitioner,*

**vs.**

**INTERNATIONAL VAN LINES,**

*Respondent.*

**On Writ of Certiorari to the United States Court  
of Appeals for the Ninth Circuit.**

**BRIEF FOR RESPONDENT.**

**Opinions Below.**

The history of the opinions below is adequately set forth in the Board's Brief.<sup>1</sup>

**Jurisdiction.**

The jurisdictional requisites are adequately set forth in the Board's Brief.

**Question Presented.**

The Board's statement of the Question Presented does not cover subsidiary questions which are fairly

<sup>1</sup>References to "Pet App" shall refer to the Appendices to the Board's Petition for the Writ of Certiorari. References to "A" shall refer to the separate Appendix to the Board's Brief on the merits. Reference to "Resp App" shall refer to the single appendix to Respondent's Brief on the merits.

comprised within the question presented by the Board. Accordingly, pursuant to Rule 23(1)(c) of the Rules of this Court, Respondent respectfully submits the following additional questions:

(1) Whether striking to force an employer to consent to a Board election was concerted activity protected by Section 7 of the Act under the following circumstances:

(a) No request for recognition was made by the Union either prior to the filing of the Petition or prior to the commencement of the strike.

(b) The Petition filed by the Union failed to allege that request for recognition was made by the Union, or was declined by the Employer.

(c) The strike commenced nine (9) days after the filing of the Petition, which was at that time, being processed by the Board.

(d) The Employer engaged in no acts or omissions to cause delay in the processing of the Petition.

(2) Whether striking to force an Employer to recognize the Union is concerted activity protected by Section 7 of the Act under the circumstances outlined in 1(a) through 1(d) above, and in addition thereto, where the picketing in support of such strike continued for more than thirty (30) days.

(3) Whether a "labor dispute" existed within the meaning of Sections 2(3) and (9) of the Act under the following circumstances:

(a) A strike called to protest dismissal of employees by employers not related to the struck employer (Respondent).

(b) A strike knowingly called on the false pretext that the employer had withdrawn its consent to a Board election.

Only if the foregoing subsidiary and threshold questions are answered by this Court in the affirmative, does it become necessary to address the question presented by the Board. Should this Court determine that the Board's question merits resolution, either as the dispositive issue in the case, or for future clarification, the question should be posed as follows:

Whether employees engaged in an economic strike, who are discharged for that activity before they have been permanently replaced and then continue to strike, have an absolute right to be reinstated to their former jobs, absent any evidence that the discharges were a significant factor in prolonging the strike.

#### **Statute Involved.**

In addition to the sections set forth in the Board's Brief, the relevant provisions of the National Labor Relations Act, as amended, (hereinafter referred to as the "Act") (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

"Section 2. When used in this Act

\* \* \*

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms

or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

\* \* \*

"Section 8(b). It shall be an unfair labor practice for a labor organization or its agents.

\* \* \*

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

\* \* \*

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.

\* \* \*

"Section 9

\* \* \*

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

\* \* \*



"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

\* \* \*

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a)"

\* \* \*

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

\* \* \*

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

\* \* \*

### **Regulations Involved.**

The relevant provisions of the Rules and Regulations of the Board are as follows:

#### **Section 102.61**

*Contents of petition for certification; contents of petition for decertification.*—(a) A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

\* \* \*

(7) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the act or that the labor organization is currently recognized but desires certification under the act.

\* \* \*

#### **Section 102.63**

*Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.*

(a) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation.

a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

\* \* \*

Section 102.64

§ 102.64 Conduct of hearing.—(a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

\* \* \*

Statement of the Case.

The Board's "Statement" of its Findings of Fact (Board Brief, p. 3, *et seq.*) requires some amplification.

(1) The Union made no request for recognition, either prior to the filing of the Petition or to the commencement of the strike (A. 11-13, 43-44).

(2) The petition itself contains no entry as to Item 7a (Resp App, Pet App 36, 40).

(3) The announcement by Teamster Agent Sanders at a meeting with the "men" that Respondent had withdrawn its consent to a Board election was false and was known by Sanders at the time to be false. (Pet App 38, 57-58, 73 note 3).

(4) No consent to a Board election was ever given or withdrawn by Respondent (Pet App 58).

(5) On October 4, 1967 when the picketing and strike commenced, Respondent was awaiting action by the Board on the Union's pending petition for representation (Pet App 74).

(6) There is no evidence and the Board did not find that the Respondent engaged in any conduct to hinder or delay the processing of the Union's petition for an election.

(7) One of the objects of the strike and the picketing was to force Respondent to recognize the Union (A. 15, 22, 24, 26, 38). The picketing continued for more than 30 days (A. 35-37).

(8) On October 4, 1967, Robert McEwan, Respondent's President told Richard Dicus, one of his striking employees, that he had not "withdrawn [his] name for an election" (Pet App 15). Thereupon, Dicus telephoned the union office and conveyed McEwan's message, "that he had not withdrawn [his] name for an election." During that telephone conversation Dicus was again told that Respondent had withdrawn and was sent on picket duty to another Company (Pet App 17). By virtue of the stipulation entered into between Respondent and the General Counsel, Respondent must be deemed to have informed its other striking employees that it had not withdrawn from the election (A. 26).

(9) With the exception of Sal Casillas and the requests made on December 12, 1967, all requests for reinstatement by strikers were conditioned upon Respondent signing a contract with the Union (A. 18, 19, 23, 26-29, 32-37, 49-51).

### Summary of Argument.

Respondent will show herein the following:

1. Subsidiary and fairly comprised within the question of the reinstatement rights of the strikers is the question whether or not the strike itself was protected activity within the meaning of Section 7 of the Act.

2. If, as the Board contends, the object of the strike was to force Respondent to forego its right to a hearing and consent to an election, such activity is not protected. The Act unequivocally gives an employer the right to a pre-election hearing. The legislative history of the 1947 Taft-Hartley amendments to the Wagner Act shows a clear Congressional intent to safeguard that right.

3. The petition filed by the Union was fatally defective in that it failed to allege (and indeed could NOT have truthfully alleged) a request for recognition by the Union. Both the Act and the Board's rules and regulations promulgated thereunder require that a Union request recognition prior to the filing of a petition for representation. This fatal defect rendered the petition a nullity. In late November and on December 12, 1967, when the strikers requested reinstatement, they had been picketing for recognition for more than thirty (30) days, without the filing of a *valid* petition. The record establishes that recognition was an object of the picketing at the outset, and *the* object of the picketing as the strike matured. Under those circumstances, the picketing was not protected activity.

4. The strike was not called to protest a current labor dispute within the meaning of Section 2(3) and (9) of the Act. Neither the Union nor any of the striking employees had asked anything of Respondent which Respondent had refused. The dismissal of employees by other employers could not be the basis of a "labor dispute" with Respondent. The fabrication that Respondent had withdrawn its consent to an election was known by the Union to be false and was denied by Respondent to Richard Dicus on the first morning of the picketing. That denial was immediately communicated to the other strikers and to the Union. Nevertheless, the picketing continued. A strike called in bad faith to protest a non-existent grievance, cannot be said to be a labor dispute within the meaning of the Act.

5. The strike continued on and after October 5th, 1967, because Respondent refused to sign a contract with the Union. The telegram sent to strikers on October 5th, 1967, was not a significant factor in prolonging the strike.

6. Assuming *arguendo* that the strike was protected activity, and absent evidence that the termination of the strikers was a significant factor in prolonging the strike, the only appropriate remedy is to restore the discharged economic strikers to their former status as economic strikers. True, an economic striker retains his status as an employee, but it is not appropriate to elevate such striker to active employee status, when in fact by virtue of his own voluntary act he is in an in-



active strike status whereby he has lawfully withheld his services from his employer. To grant to such "employee" absolute reinstatement rights is to go beyond the remedial purpose of the Act. Respondent does not question the authority of the Board to order an employer to restore the "status quo ante" and to make the employees whole for any wages lost by reason of unfair labor practices. However, on the record before this Court, the "status quo ante" is the striker's position before the telegrams of October 5, 1967, which is that of an "Economic Striker," entitled to reinstatement only if not permanently replaced.



**ARGUMENT.**

**I.**

**The Question: Whether or Not the Strike and Picketing Which Commenced on October 4, 1967, Was Concerted Activity Protected by Section 7 of the Act Is Properly Before This Court.**

The question presented by the Board in its Petition for the Writ of Certiorari can only be the basis for a meaningful decision if the subsidiary questions contained therein are also considered. Those questions as set forth hereinabove are both significant and vital to the proper enforcement of the Act and the orderly administration of the National Labor policy. Should this Court pass only upon the question proffered by the Board, it will, by implication, be affirming the findings of the Board and the Court below, to wit: a strike to force an employer to consent to a Board election is protected activity as defined by Section 7 of the Act. Respondent respectfully submits that by placing the issue of the appropriate remedy before this Court, the Board has also submitted the underlying issues as to the nature of the concerted activities and the application thereto of Section 7. Resolution of those issues is threshold to the question of remedy. Respondent is not raising a question as to the adequacy of the evidence in support of the Board's findings. Respondent stands upon those findings in questioning the propriety of the Board's conclusion that the strike was protected activity, *as a matter of law*.

Respondent, a very small company, has been embroiled in this costly litigation for more than four years. The Board's complaint was issued in response to Respondent's reaction to a strike called in bad faith, without notice or reason. Simple economics dictated Re-

spondent's decision to seek no further review following the decision of the Court below. Settlement discussions with the Board's Regional Compliance Officer were making substantial progress when Respondent was informally advised that the Board had decided to seek review. By the time Respondent received a copy of the Board's Brief in support of the Petition for the Writ of Certiorari, on January 12, 1972, the 90 day period for filing its own petition had expired. Respondent's Answer was mailed on February 4, 1972, following its decision, financial hardship notwithstanding, to present its case to this Court. Simple principles of equity and fair play should estop the Board from asserting that the Answer (filed in the nature of a cross-petition) was untimely filed, under the circumstances herein, where through its authorized agent, the Board was negotiating a settlement with Respondent at the very time it was preparing the Petition for a Writ of Certiorari.

In view of the foregoing, the late filing should not preclude consideration by this Court of the significant issues raised by Respondent. However the Court may view Respondent's *Answer*, the questions posed herein by Respondent fall within the purview of Rule 23(1)(c) of the Rules of this Court, which states,

"The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein".

Respondent respectfully submits that the subsidiary questions merit this Court's consideration.

II.

**II, as Found by the Board, the Object of the Strike Was to Force Respondent to Consent to an Election, the Strike Was Not Activity Protected by the Act.**

**Legislative History.**

Section 9 of the Wagner Act, 49 Stat. 453, provided that in the course of its investigation of a question concerning the representation of employees, "the Board shall provide for an appropriate hearing. . . ." The Wagner Act Board in construing its authority under Section 9, apparently viewed the provision for "an appropriate hearing" to be permissive and not mandatory. Accordingly, prehearing elections were conducted. Opponents of the 1947 Taft-Hartley amendments 61 Stat. 143, viewed the pre-hearing election as highly beneficial to union organizational efforts. In voicing his displeasure with the deletion from the Conference report of the provision for prehearing elections, Senator Morse said,

"Under the conference amendment, however, the election will always have to be delayed until after the hearing the Board action, sometimes many months later, even though there is no reason why an immediate election cannot be held, except refusal of a recalcitrant employer or union desiring delay to consent."

*Congressional Record, Senate, page 6611, June 5, 1947.*

Senator Pepper, another critic of the 1947 amendments and in particular Section 9 (c) (4), said,

"The effect of that [9(c)(4)] is, by implication, to prevent the Board from granting a prehearing election which as a practical matter, will delay the functioning of the Board in giving effect to the right of collective bargaining, which the bill professes to give to the workers of the country."

*Congressional Record, Senate, Page 6675, June 6, 1947.*

Despite the opposition, Section 9(c)(4) was passed by the Congress *without a provision for pre-hearing elections*. Section 9(c)(4) was not altered by the 1959 Landrum-Griffin amendments, 73 Stat. 525.

If any doubt lingers as to the Congressional view of the importance of the pre-election "hearing" and the congressional intent that such hearing shall be an inviolate right of the parties to a representation proceeding, the statement of Senator Taft in a supplementary analysis of the Section 9(c)(4) as passed, should put such doubts to rest.

"Section 9(C)(4): The conferees dropped from this section a provision authorizing prehearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. *It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.* During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and because the House conferees strenuously objected to its continuance it was omitted from the bill." (Emphasis added).

*Congressional Record, Senate, Page 7002, June 12, 1947.*

The Board's statement of "*Procedure Under Section 9(c) of the [Wagner] Act for the Investigation and Certification of Representatives*", made only a general reference to a hearing. In contrast, Section 102.63 of the Board's Rules and Regulations promulgated to implement Section 9 as amended in 1947, reflects recognition by the Board of the importance of the procedural *rights* granted to the parties by the Act. The functions of the Regional Director's investigation and of the hearing are clearly enunciated. After a petition is filed, absent consent by the parties to an election, the Regional Director must exercise his discretion and decide:

- (a) Does a question of representation affecting commerce exist?
- (b) Will an election effectuate the policies of the Act?
- (c) Will an election reflect the free choice of the employees?
- (d) Is the bargaining unit as described in the petition appropriate?
- (e) Who is eligible to vote?

The record made at the "Hearing" forms the basis for the Regional Director's exercise of discretion. *The hearing must take place, unless waived by the parties.*

*Section 102.63 (supra).*

Despite the clear mandate of the Congress, and its own elaborate regulations setting forth the rules for the processing of representation petitions, the Board *here* champions the use of the strike as a lawful means to force an employer to forego rights as important to em-

players as Section 7 is to employees. The Act charges the Regional Director with substantive duties in the investigation and processing of a representation petition. The Act, without equivocation or qualification grants to the employer a hearing *prior* to the election. The Board contends nevertheless, that the Regional Director's duties and the employer's rights are expendable. The Board declares that *a strike may lawfully be called to force an employer to consent to an election.*

Respondent disagrees! Such a strike is an act in derogation of and destructive to the policies of the Act and the Board's lawful processes. As such it should not be clothed with protections otherwise afforded to employees by the Act and those same processes.

#### **The Pertinent Cases.**

In support of the thesis that a strike to force an employer to consent to an election is activity that is lawful and protected by the Act, the Board cites two of its own decisions. *New Orleans Roosevelt Corp.*, 132 NLRB 248, and *Philanz Oldsmobile, Inc.*, 137 NLRB 867. Both decisions merit comment.

In *New Orleans Roosevelt* the petition was filed on April 22, 1959. Hearings were held in June and July 1959 and were not concluded as late as February 1960, at which time the Board reopened the hearing to receive evidence as to its legal jurisdiction. Thereupon, on February 2, 1960, the Union gave the employer notice that picketing would commence unless it agreed to a consent election. From the above facts, it is clear that the normally expeditious election processes of the Board had bogged down, and the Board on its own motion had reopened the hearing on the basic issue of its jurisdiction. It is fundamental that if the Board found



it lacked jurisdiction, it could not have directed that an election be held. It was under those extreme circumstances that the Union, after giving the employer notice, elected to strike. The Board's decision in *New Orleans Roosevelt* that the strike was a protected activity, is testimony to the wisdom of the oft quoted statement of Mr. Justice Holmes, that "hard cases make bad law." *Northern Security Co. v. United States*, 193 U.S. 197.

Following the decision in *New Orleans Roosevelt* the Board was faced with *Philanz Oldsmobile, Inc.*, (*supra*). There, a week after the petition was filed the employees informed the union representative that they were planning a walkout because they believed the employer was delaying the election. The union representative attempted to discourage the plans for a walkout, but nevertheless notified the employer of the contemplated strike and urged it to consent to an election. The employer took no action and the employees struck. A majority of the Board, citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 and *New Orleans Roosevelt*, held that the strike was protected activity. The majority's reliance upon *Washington Aluminum* was misplaced. There, no petition was pending before the Board, the employees were neither represented by nor allied with any labor organization, and perhaps most significant, the work stoppage was a protest over a condition of their employment (an unheated shop). *Washington Aluminum* does not stand for the proposition that a strike to force a consent election falls within the purview of Section 7. On the contrary, despite the fact that *New Orleans Roosevelt* was decided on July 20, 1961 and *Washington Aluminum*, on May 28, 1962, almost one year later, no reference to the extreme extension of Section 7 by the



Board in *New Orleans Roosevelt* was made by Mr. Justice Black, writing for this Court in *Washington Aluminum*. It would appear to Respondent that if this Court intended to extend Section 7 to a strike to force a consent election, it would have said so, citing *New Orleans Roosevelt*. In the absence of such citation, *Washington Aluminum* can not constitute authority in support of the Board's position herein.

Further, the majority in *Philanz Oldsmobile* (*supra*) exhibited some confusion as to the meaning of the word "consent" when they stated,

"There is nothing in the Board's rules or in the Act which prohibits parties from agreeing to a consent election even where a representation petition has been filed at a regional office of the Board."

The question is whether the Act gives an employer the right to a hearing if he wishes to *withhold* his consent? The plain wording of Section 9 and the legislative history answer that question in the affirmative.

Board members Rodgers and Leedom recognized that right in their dissent in *Philanz Oldsmobile*, where in they stated.

"... we would confine *New Orleans Roosevelt*, *supra*, on which the majority relies in part, to the facts therein, namely, an authorized strike to compel a respondent to agree to a consent election when it was engaged in a deliberate attempt to delay the holding of a representation election. In the instant case it is clear that when the employees struck, there had been no undue delay in holding the election, and there is no evidence that

Respondent was seeking any unwarranted delay. Under these circumstances it would in our view, even had the strike been authorized, have made a mockery of the Board's consent election procedure to hold the objective protected and, in effect, have taken the word 'consent' out of such procedure."

Respondent submits that the dissent of Members Rodgers and Leedom is the correct statement of the law.

In *Harnischfeger Corporation*, 9 NLRB 676, 686, the Board said,

"Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of collective activity." *cf.*, *International Union, UAW v. Wisconsin ERB*, 336 U.S. 245.

The case authority cited by the Board is less than persuasive when contrasted with the clear language of the Act. The legislative history of Section 9(c)(4), only serves to underscore the importance of the pre-election hearing to the process of determining the representative status.

The Taft-Hartley Amendments were passed to correct some of the imbalance created by the Wagner Act, which was clearly designed to stimulate and promote union organizational efforts. An awareness that the balance of power had shifted twenty years later, is illustrated by Mr. Justice Frankfurter dissenting for him-

self and Justices Minton and Harlan in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270. The dissent argued in favor of a strict application of the 60 day "no strike" requirement imposed by Section 8(d) of the Act.

"We are therefore confronted with the demonstrable fact that if the provisions stripping strikers of their status during the 60 day period is to have any usefulness at all and not be an idle collection of words, the fact that a strike during that period is induced by the employer's unfair labor practice is immaterial. Even though this might on first impression seem an undesirable result, it is so only by rejecting the important considerations in promoting peaceful industrial relations. . . . *The Congress may have set a very high value on peaceful adjustments, i.e. the absence of strikes. One may take judicial notice that this consideration was at the very forefront of the thinking and feeling of the Eightieth Congress.*" (Emphasis added). *Mastro Plastics Corp. v. NLRB* (*supra*).

Again in *NLRB v. Insurance Agents International*, 361 U.S. 477, Mr. Justice Frankfurter writing for himself and Justices Harlan and Whitaker, noted in a separate opinion that the premise upon which the Wagner Act was passed—the inequality of bargaining power in favor of management, is no longer is valid.

"The main purpose of the Wagner Act was to put the force of law behind the promotion of unionism as the legitimate and necessary instrument 'to give laborers opportunity to deal on equality with their employer.' Mr. Chief Justice Taft for the Court, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184,

209. Equality of bargaining power between capital and labor, to use the conventional terminology of our predominant economic system, was the aim of this legislation. The presupposition of collective bargaining was the progressive enlargement of the area of reason in the process of bargaining through the give-and-take of discussion and enforcing machinery within industry, in order to substitute, in the language of Mr. Justice Brandeis, 'processes of justice for the more primitive method of trial by combat.' *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (dissenting). Promotion of unionism by the Wagner Act, with the resulting progress of rational collective bargaining has been gathering momentum for a quarter of a century. *In view of the economic and political strength which has thereby come to unions, interpretations of the Act ought not to proceed on the assumption that it actively throws its weight on the side of unionism in order to redress an assumed inequality of bargaining power. For the Court to fashion the rules governing collective bargaining on the assumption that the power and position of labor unions and their solidarity are what they were twenty-five years ago, is to fashion law on the basis of unreality. Accretion of power may carry with it increasing responsibility for the manner of its exercise.*

*Therefore, in the unfolding of law in this field it should not be the inexorable premise that the process of collective bargaining is by its nature a bellicose process. The broadly phrased terms of the Taft-Hartley Act should be applied to carry out the broadly conceived policies of the Act.*

*At the core of the promotion of collective bargaining, which was the chief means by which the great social purposes of the National Labor Relations Act were sought to be furthered, is a purpose to discourage, more and more, industrial combatants from pressing their demands by all available means to the limits of the justification of self-interest. This calls for appropriate judicial construction of existing legislation. The statute lays its emphasis upon reason and a willingness to employ it as the dominant force in bargaining. That emphasis is respected by declining to take as a postulate of the duty to bargain that the legally impermissible exertions of so-called economic pressure must be restricted to the crudities of brute force. Cf. Labor Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 4 LRRM 515." (Emphasis added).*

It is significant that in the twenty-five years since the enactment of Section 9(c)(4) only two Board decisions have treated with the legality of a strike to force a consent election. Respondent has been able to find no decision of a Circuit Court of Appeals, other than the Court below in this case, which has passed upon the propriety of a strike to compel a consent election. Considering the thousands of representation petitions filed each year, the only logical conclusion to draw from the paucity of decisional law on this issue, is that the Board's processes, and not resort to the strike, are being used to determine the representation issue.<sup>2</sup> The continued use of the orderly proc-

<sup>2</sup>"Simply stated, our national labor policy holds that industrial peace and stability is the desideratum. . . ." See *Jodice v. Calabrese*, 291 F. Supp. 592 (U.S.D.C., S.D.N.Y.), distinguishable on the facts.



esses of the Board will necessarily be jeopardized by this Court's approval or silence as to the propriety of the position taken by the Board and the Court below. To encourage the use of economic muscle in derogation of the peaceful and orderly machinery created by the Act, will be a giant step backward. This Court in *Boys Market, Inc. v. Retail Clerks*, 398 U.S. 235, has endorsed the peaceful resolution of industrial disputes, even at the expense of what was once considered the inviolate right to strike. The reasoning of Mr. Justice Frankfurter, in his dissent in *United Mine Workers v. Arkansas Oak Floor Co.*, 351 U.S. 62 lends support to Respondent's position that the strike which began on October 4, 1967, in the case at bench, should not be blessed with the protections afforded by the Act. Although *United Mine Workers v. Arkansas Floor Co.* (*supra*) dealt with noncompliance with the Act by the failure of the Union to file non-communist affidavits, the principle there involved is analogous to the instant case.

"A noncomplying union such as the petitioner, however vigorously it may assert noncompliance as a matter of principle, is not under condemnation of illegality by the Taft-Hartley Act, or any other federal law, from employing economic pressure to achieve its goal. The explicit consequence which that Act attaches to non-compliance is that such a union is denied the advantages of the National Labor Relations Board; it cannot utilize that Board's machinery to obtain certification as the bargaining representative or to secure redress against unfair labor practices by an employer."

Respondent does not question the right to strike free from the threat of injunction. The use of the injunction

is carefully prescribed and limited by the Act. Nevertheless, certain concerted conduct, not specifically enjoined, has resulted in withdrawal of the protections of the Act. For example:

A strike conducted by a minority of a bargaining unit without authorization of the majority. *Confectionery and Tobacco Drivers and Warehousemen's Union, Local 805 v. NLRB*, 312 F.2d 108 (CA 2, 1963).

Selective refusal to perform certain aspects of the job, i.e. refusal to work overtime.

*NLRB v. Valley City Furniture Co.*, 110 NLRB 1589, enforcement denied, 230 F.2d 947 (CA 8, 1946).

A strike to force an employer to violate the law.

*Southern Steamship Co. v. NLRB*, 316 U.S. 31;  
*American News Co., Inc.*, 55 NLRB 1302.

See also *NLRB v. Insurance Agents International (supra)*, wherein this Court noted that although a union did not violate Section 8(b)(3) by formulating a policy of harassment and slowdown tactics during bargaining for a new contract, such activities engaged in by the employees, may not be protected activities within the meaning of Section 7.

As this Court stated in *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, which held that an employer may use the "lock out" as a weapon against an economic strike,

"The ultimate problem is the balancing of conflicting and legitimate interests."

On the basis of the foregoing, the interests of the public expressed by the plain language of the Act and the policy which favors peaceful and orderly resolution



of labor relations problems, should prevail over a single minded view which has always favored the unbridled use of the strike. This is particularly true when, as here, the processes of the Board were in motion and were unhindered by the employer. The Board and the Court of Appeals below were therefore in error in holding this strike to be protected activity within the meaning of the Act.

### III.

**The Board's Alternative Finding That the Strike Was Protected Activity If Its Objective Was to Compel Recognition Is in Error.**

The Board contends that a strike for recognition under the attendant facts is protected activity so long as Section 8(b)(7) was not violated. Here again the Board exhibits a position, solicitous of the right to strike and less concerned with its own processes and the Act, which purport to afford the employer certain rights. This tendency will be illustrated hereinbelow.

#### **Legislative History.**

Section 9 of the Wagner Act contained no specific requirements as to the content of a petition for representation. The language was general and left such details to the Board. The Taft-Hartley amendments resulted in a new Section 9, far more definitive than its predecessor. Of particular significance is the requirement of the amended Section 9(c)(1)(A)(i) (which was not altered by the 1959 Landrum-Griffin amendments) that a petition for representation filed by employees or a labor organization acting in their behalf, *allege that "their employer declines to recognize their representative . . ."* (Emphasis added). The Board's implement-

ing rules and regulations, at Section 102.61 reiterate that requirement. NLRB Form 502, the printed form for such petition (Resp App), at Item 7a provides for an appropriate entry to that effect.

The record of this case is clear and the Board does not contend otherwise, that neither prior to the filing of the petition on September 21, 1967, nor the commencement of the picketing on October 4, 1967, did the Union request recognition. The petition itself contains no entry at Item 7a (Resp App). It is therefore undisputed that the petition was defective in that it failed to comply with Section 9(c)(1)(A)(i) of the Act. The strike and the picketing continued until April 3, 1968.

Considering the substantial change from Section 9 of the Wagner Act to Section 9(c)(1)(A)(i) of the Taft-Hartley amendment, (the language of the Act that controls this case) it is reasonable to conclude that the remedial legislation of 1947 was intended to *require* notice to an employer in the form of a request for recognition, before the Board could entertain a petition. If such notice was not intended as a prerequisite to action by the Board, why then was such specific language included in the amendment? Moreover, it would appear that the Board in formulating its implementing rules and regulations, construed the language of 9(c)(1)(A)(i) as mandatory. Section 102.61 of the Rules and Regulations declares that the petition *shall* contain, *inter alia* "*A statement that the employer declines to recognize the petitioner. . . .*" (Emphasis added).

Further support for the argument that the Act was intended to require notice to the employer before the Board could entertain a petition, is the prefatory lan-

guage of Section 9(c)(1) which states that "Whenever a petition shall be filed, *in accordance with such regulations as may be prescribed by the Board*" etc. (Emphasis added) the machinery of the Board shall begin to function. As noted heretofore, the Board's regulations require that the employer decline recognition and that petition so allege. Failure to satisfy that requirement can only result in a petition which *has not been filed "in accordance with such regulations as [have been] prescribed by the Board."* The requirement having been couched both in the statute and in the implementing regulation as a condition precedent to the filing of a petition, the petition filed in this case on September 21, 1967, must be deemed fatally defective—a nullity. However technical the argument may appear, and however appealing the contention that the employer receives notice when served with a copy of the petition *after* it is filed, there can be no disagreement as to the plain language of both the statute and the regulation. There is no room for liberal interpretation. The legislative history militates in favor of strict construction.

It must follow then, that the picketing which had recognition as an objective, had continued for more than 30 days when in late November, 1967, striker Casillas, and in December, 1967, strikers Manuel and Robert Vasquez and Richard Dicus, requested reinstatement. At the time of each request for reinstatement, those strikers had for some time been picketing in violation of Section 8(b)(7) of the Act. It is sufficient that one object of the picketing was recognition. It is not fatal to a finding of a violation of 8(b)(7) that the picketing may also have been to protest the employer's unfair labor practices. The result of the strikers participa-

tion in the forbidden picketing is that they may not invoke the Act to compel reinstatement. *National Packing Company v. NLRB*, 377 F.2d 800, 804 (CA 10, 1967).

*Cf., Warehouse and Mail Order Employees Union, Local 743*, 144 NLRB No. 87.

Assuming *arguendo*, that Respondent did in fact violate Sections 8(a)(1) and (3) by its telegram of October 5, 1967, the participation thereafter of those strikers in picketing violative of the Act should nevertheless bar them from reinstatement. Their subsequent involvement in unprotected picketing should cancel out any prior violation of the Act by Respondent.

The Board may not properly contend that Respondent's unfair labor practice is a defense to picketing in violation of 8(b)(7). After a searching analysis of the legislative history of Section 8(b)(7), the Court in *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634 (CA DC, 1963) concluded that only a violation of Section 8(a)(2) was intended by the Congress to constitute a defense to 8(b)(7) picketing.

"We can only conclude that the Conference and the Congress considered and deliberately abandoned the thought of making every employer unfair labor practice a blanket defense to an 8(b)-(7) charge." at p. 643

\* \* \*

"We are unable to conclude that the House Conferencees conceded in Conference that unfair practice picketing could lawfully continue beyond the 30 day period fixed by Section 8(b)(7) if such picketing also had an organizational or recognitional objective, or that either the Senate or the House intended that such picketing would be permitted under the 1959 Act." at p. 645.

For the foregoing reasons Respondent submits that at the time they requested reinstatement the strikers in this case were engaged in activities *not* protected by the Act.

#### IV.

#### **The Strike That Commenced on October 4, 1967 Was Not in Protest Over a Labor Dispute Within the Meaning of the Act.**

The Board and the Court below disagreed with the Trial Examiner's conclusion that no "labor dispute" existed between Respondent and the Union at the time the latter caused the strike to commence (Pet App 24, 40, 74).

*NLRB v. MacKay Radio and Telephone Co., Inc.*, 304 U.S. 333, was offered by the Board and accepted by the Court of Appeals as authority for the general proposition that the wisdom or unwisdom of a strike, the justification or lack of it, does not alter its status as protected activity. It is noted that in *MacKay Radio* the strike occurred during contract negotiations. The Board here has lifted <sup>those</sup> ~~that~~ references to "wisdom or unwisdom, justification or lack of it" out of their factual context. The complete statement is far more restrictive, and clearly focuses on the pending contract negotiations.

The Court said,

"The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute."

*NLRB v. Mackay Radio & Telegraph Co.*  
(*supra*) at page 344.

The flaw in the Board's position is that implicit in the *MacKay Radio* decision is the element of *good faith*. Respondent does not question the applicability of the protective features of the Act to concerted employee action, however mistaken their belief that they had a dispute with their employer, *so long as the Union or the employees act in good faith*.

The facts of the case at bench belie *good faith*. The facts spell "bad faith." The Union, having had no communication with Respondent, and having made no request or demand which had been denied or tabled by Respondent, fabricated a story of withdrawal by Respondent of its consent to an election (Pet App 73). On October 4, 1967, as soon as he discovered the false accusation Robert McEwan, Respondent's President, denied taking such action and so informed the striking employees who thereupon advised the Union of McEwan's statement of denial (A. 15, 17, 26). The true status of the Petition and Respondent's actions in respect thereto were at the time known to the Union. The Trial Examiner found the story of the withdrawal to have been a fabrication. (Pet App 73-74) It is obvious that the Union had no interest in pursuing the petition. The strike continued.

To characterize the above situation as a labor dispute is to sanction deceit any time a labor organization or group of employees seek to clothe intended conduct that may otherwise be unprotected, with the cloak of Section 7. The employees here are bound not only by their knowledge of Respondent's denial, but by the



knowledge of the Union, their designated agent, that the "so called dispute" was a fabrication.

The text of Section 2(9) itself can only be construed to mean that the controversies enumerated therein be real, or if mistaken, that such mistake be a good faith mistake. It is unreasonable to include within the purview of a "labor dispute" as defined by the Act, a dispute deliberately conjured up out of thin air. A false assertion made with knowledge of its falsity that a dispute exists is no more than a sham.

"The Act has been interpreted as conferring Board jurisdiction over a variety of labor matters, but there can be no jurisdiction where the complaint presents a controversy unrelated to the resolution of a 'labor dispute' as defined."

*NLRB v. International Longshoremen's Association*, 332 F.2d 992, 995 (CA 4, 1964);

*Sheetmetal Workers International Association, Local Union No. 223 v. Florida Heat & Power, Inc.* (Fla. App. 1968) 214 So.2d 783.

Based upon the foregoing, Respondent submits that when the employees ceased working to join the October 4 strike, no current labor dispute within the meaning of Sections 2(3) and (9) of the Act existed. Therefore, the protections of the Act could not be available to such strikers, who by their own conduct ceased to be employees within the meaning of Section 2(3).



V.

**The Court of Appeals Was Correct in Holding That the Discharge of Economic Strikers Before They Have Been Permanently Replaced Does Not Automatically Entitle Them to an Unconditional Right to Reinstatement.**

Respondent has urged this Court to find that the October 4 strike, either at its inception (Argument II and IV) or after the picketing had continued for more than 30 days (Argument III), was activity unprotected by the Act. Should this Court find merit in any of Respondent's contentions therein, it need not address the issue of reinstatement rights of the strikers. Convinced as Respondent may be of the merit of its position, prudence dictates discussion of this issue.

Respondent concedes that if the strike was a lawful concerted activity at its inception, and if the recognitional picketing beyond the 30 day limitation of 8(b)(7) did not deprive the strikers of their Section 7 rights, they are entitled to certain reinstatement rights.

The Board seeks a *per se* rule, which would automatically convert a wrongfully discharged economic striker into an unfair labor practice striker. On page 15 and 16 of its Brief, the Board says,

"It is true, as the court below noted, that at the time of their discharges the four employees were protesting only the original grievance (Pet App 27). However, since the employees continued to strike after their unlawful discharge, it is reasonable to conclude that they were protesting not only the original grievance but also the subsequent unfair labor practice against them."

It is apparent then, that the Board would substitute a *conclusion* in lieu of the requirement imposed by the Court below, that there be *evidence* that the unfair labor practice was a significant factor in the prolongation of the strike. Examination of the record in this case shows clearly that only the signing by Respondent of a contract, and nothing short of that, would have ended the strike (Pet App 18, 19, 23, 26-27, 29, 32-37, 49-51).

The Court of Appeals at page 912, in Footnote 5 recognized the evidentiary vacuum and the defect in the Board's reasoning.

"The Board argues that in this case, the Company's unfair labor practices were clearly 'a significant factor' in the strike, since the discharge of economic strikers 'necessarily \* \* \* restrains employees from engaging in concerted activities for their mutual aid and protection \* \* \*'. The Board adduces no evidence in support of this necessary effect."

There was nothing revolutionary in the decision of the Court of Appeals in this case. In *NLRB v. James Thompson & Co.*, 208 F.2d 743 (CA 2, 1953), the Second Circuit enunciated the identical principle. The Board would distinguish *James Thompson* as involving a violation of 8(a)(1) by promising a wage increase while refusing to recognize the Union. The Board asserts that, here, the strikers were ready to return to work, but "were prevented from doing so because they had been unlawfully discharged." (Board's Brief, p.

17). The Board is in error. When the strikers applied for reinstatement (with the exception of Casillas, a casual employee) they were informed that Respondent had hired replacements (Pet App 37-38, 70). It was in respect to the issue of whether or not Respondent had legitimate and substantial business justification for not reinstating the strikers, that the Court of Appeals remanded the case to the Board.

This Court is faced with choosing between the Board's rule which ignores the evidence as to the cause of the continuation of the strike in favor of a *per se* rule, and the rule of the Court of Appeals that requires evidence of causation.

The purpose of the Act is remedial and not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7. The object of a remedial law is to correct the wrong—to restore the *status quo ante*. The Board in support of its position notes that a wrongfully discharged employee retains his protected employee status under Section 2(3) of the Act. What the Board ignores is that the "employee" status that is retained can only be the status held by the employee prior to the wrongful discharge. It cannot be seriously contended that there is no distinction between an actively working employee and one who is withholding his services (however lawfully) by participating in a strike. To grant to a discharged economic striker more than the reinstatement rights the unlawful discharge attempted to take away, is to do more than restore the *status quo ante*. There is neither logic nor need for such a remedy. It is sufficient to

nullify the illegal act. It is beyond the scope of a remedial law to give a discharged striker the reinstatement rights of a discharged active employee; or of an unfair labor practice striker, absent substantial evidence that the wrongful discharge was a significant factor in prolonging the strike.

*NLRB v. James Thompson & Co. (supra);*

*NLRB v. Frick Co.*, 397 F.2d 956 (CA 3, 1968);

*Cf., NLRB v. Jackson Press, Inc.*, 201 F.2d 541 (CA 7, 1953).

The brief *amicus* filed by the American Federation of Labor And Congress of Industrial Organizations, at page 2, states that the decision of the Court of Appeals "is an invitation to employers to rid themselves of union activists . . ." Respondent fails to see any basis for that statement. *MacKay Radio* permits an employer to permanently replace an economic striker. An employer who wishes to "rid" himself of any striker may simply replace him. That is the law. The decision of the Court below does not purport to expand upon that rule. The wrongful attempt to discharge an economic striker, according to the Court below, is ineffective. The striker retains all of his rights and is entitled to reinstatement so long as he applies for it before he is permanently replaced. If permanently replaced, he has preferential reemployment rights should a vacancy occur. *NLRB v. Fleetwood Trailer*, 389 U.S. 375.

The Court of Appeals correctly stated the reinstatement rights of the strikers in this case.

**Conclusion.**

Respondent submits that its position as set forth herein accurately reflects the law as written, and the intent of the Congress in enacting the 1947 and 1959 remedial amendments to the Act. Respondent further submits that the realities of labor-management relations today militates in favor of the use of existing procedures for peaceful and orderly determination of the representative status, as opposed to the strike in derogation of those procedures.

There is no longer a need or a justification for interpretations of the Act as the Board seeks herein, predicated more on outdated policy considerations than the language of the Act and the legislative intent. Labor stands today, at the very least, with strength and resources equal to those of Management. The law should be the neutral arbiter, protecting the rights of each protagonist in accordance with the applicable provisions of the Act.

In view of the foregoing, the decision of the Court of Appeals should be reversed and the Board's complaint dismissed in its entirety.

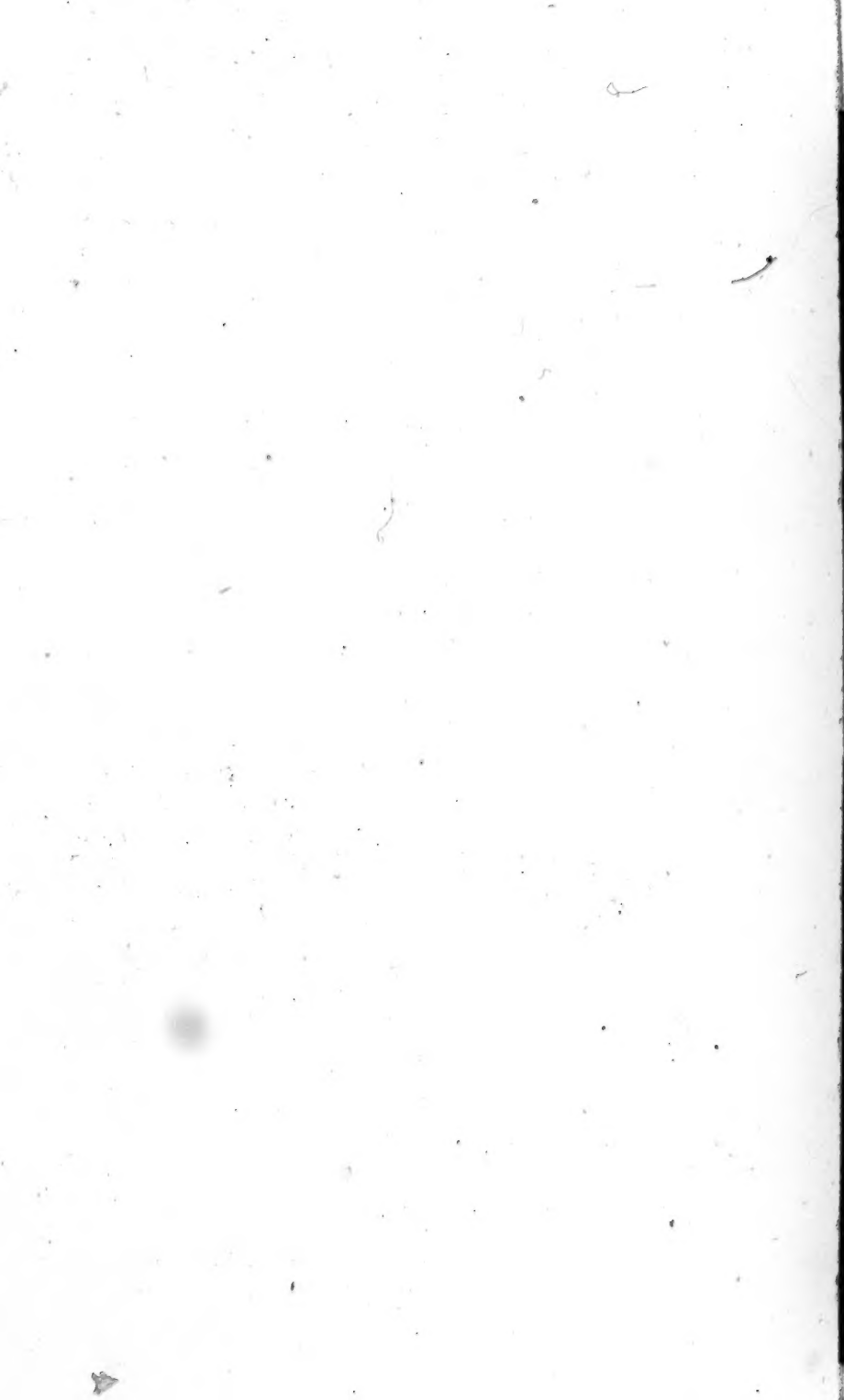
Dated: July 12, 1972.

Respectfully submitted,

NORMAN H. KIRSHMAN,  
*Attorney for Respondent.*

GOLDSTEIN, GENTILE & KIRSHMAN,  
*Of Counsel.*







UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE

CASE NO. \_\_\_\_\_

DATE FILED \_\_\_\_\_

2-21-57

INSTRUCTIONS—Submit an original and four (4) copies of this Petition to the NEHR Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering them accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under proper authority pursuant to Section 9 of the National Labor Relations Act.

Purpose of this Petition (If two RC, RM, or RD is checked and a charge under Section 8(a)(1) of the Act has been made, say the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

- ☒ **RC-CERTIFICATION OF REPRESENTATIVES**—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)**—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ **RD-DECERTIFICATION**—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ **1D-WITHDRAWAL OF UNION SHOP AUTHORITY**—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **AC-UNITY CLARIFICATION**—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: (Check one)  
☐ In unit not previously certified  
☐ In unit previously certified in Case No. \_\_\_\_\_
- ☐ **AC-AMENDMENT OF CERTIFICATION**—Petitioner seeks amendment of certification issued in Case No. \_\_\_\_\_

Attach statement describing the specific circumstances alleged

1. Name of Employer **INTERNATIONAL VAN LINES** EMPLOYER REPRESENTATIVE TO CONTACT PHONE NO. \_\_\_\_\_

2. Address(es) of establishment(s) involved (Street and number, city, state, and ZIP Code)  
**2754 Industrial Way, Santa Maria, California**

3. Type of establishment (Factory, mine, warehouse, etc.) **Van Line** 4b. Identify principal product or service **Moving Service**

4. Unit involved (If UC petition, describe PRESENT bargaining unit and attach description of proposed classification.)

Included **All truck drivers, packers, craters, order fillers, checkers, warehousemen, loaders, helpers and working foremen employed by the employer at its Santa Maria, California location**

Excluded **Office clerical employees, professional employees, guards and supervisors as defined in the Act.**

5a. NUMBER OF EMPLOYEES IN UNIT:

PRESENT **C. 5**

PROPOSED (BY UC/AC) \_\_\_\_\_

5b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?  
☒ YES ☐ NO

\*Not applicable to RM, UC, and AC

(If you have checked two RC in 1 above, check and complete EITHER line "a" or "b," whichever is applicable)

6. ☐ Request for recognition as Bargaining Representative was made on \_\_\_\_\_ (Month, day, year) and Employer declined recognition on or about \_\_\_\_\_ (Month, day, year)

7. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Bargained or Certified Bargaining Agent (If there is none, so state)

**None**

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year)

10. IF YOU HAVE CHECKED BOX 6B IN 1 ABOVE, SHOW HERE THE DATE OF EXPIRATION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11. IF THERE NOW IS A STRIKE OR PICKETING AT THE EMPLOYEE'S ESTABLISHMENT INVOLVED? YES \_\_\_\_\_ NO **X**

12. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

13. THE EMPLOYEE HAS BEEN PICKETED BY OR ON BEHALF OF \_\_\_\_\_ (Insert name) A LABOR ORGANIZATION, OR \_\_\_\_\_ SINCE \_\_\_\_\_ (Month, day, year)

14. DISCRIMINATION ON INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11E, WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS) AND INDIVIDUALS SHOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN THIS 4 ABOVE. (If none, so state)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petitioner is filed by Employer)
<b>None</b>			

**BRUNDRAGE & HACKLER** **COAL 361, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America** (Petitioner and Plaintiff, if any)

Attorneys for Petitioner... **George J. Rapp**

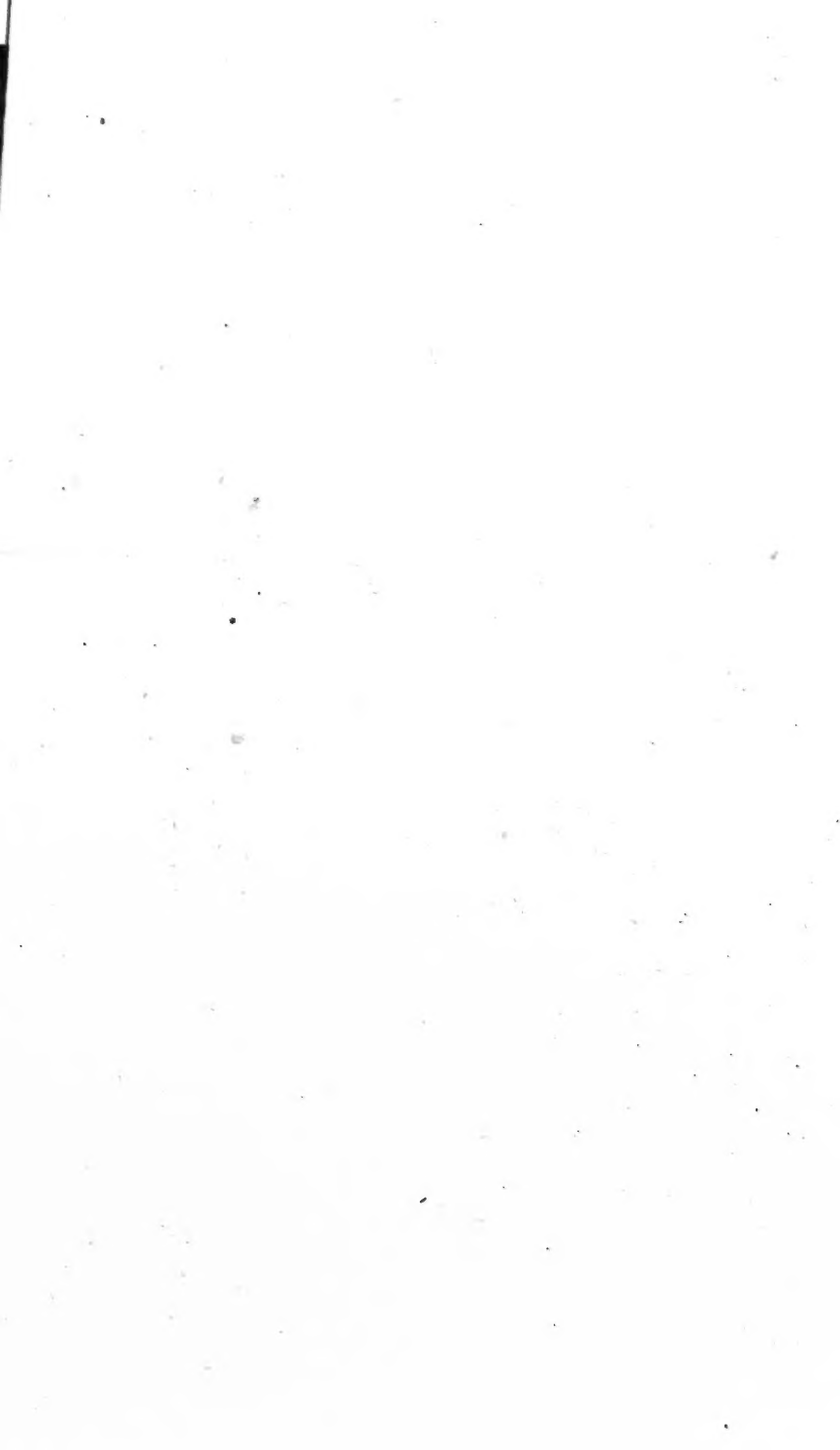
1621 West Ninth Street, Los Angeles, Calif. 90015 385-3071 (Street and number, city, state, and ZIP Code) (Telephone number)

ONLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

Service of the within and receipt of a copy  
thereof is hereby admitted this 13<sup>th</sup> day  
of July, A.D. 1972.

*Proof of Service Enclosed*

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OCT 4 1972

MICHAEL RUBIN, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

—  
No. 71-895  
—

NATIONAL LABOR RELATIONS BOARD,

v. *Petitioner,*

INTERNATIONAL VAN LINES  
—

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit  
—

BRIEF AMICUS CURIAE  
ON BEHALF OF THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
—

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

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No. 71-895

---

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*  
v.  
INTERNATIONAL VAN LINES

---

On Writ of Certiorari to the United States Court of Appeals  
for the Ninth Circuit

---

**BRIEF FOR THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
AS AMICUS CURIAE**

---

**INTEREST OF THE AMICUS CURIAE \***

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

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\* This brief is filed with the express written consent of counsel for both Petitioner and Respondent.

This brief *amicus curiae* supports the position of the respondent in urging affirmance of the decision below holding that the commission of unfair labor practices during an economic strike does not *automatically* and *mechanically* convert the strike into an unfair labor practice strike. The *amicus* believes, with the court below, that a finding of conversion should result only where evidence establishes that the commission of such unfair labor practices did, in fact, alter the strikers' purpose and prolong the strike,—a conclusion which need not follow from the occurrence, after the inception of a strike, of certain prohibited practices. The *amicus* further supports respondent's request for corrective clarification of the decision below insofar as it provides tacit judicial acceptance of petitioner's efforts unduly to expand the concept of "protected, concerted activity".<sup>1</sup>

The interest of the *amicus* is predicated upon the significance of this case to that complex body of law which has been structured through the accommodation of the need for reasonable "striker protection" with those practical operating necessities encompassed within the concept of "legitimate and substantial business justifications". *N.L.R.B. v. Fleetwood Trailers Co.*, 389 U.S. 375 (1967); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). That body of law, and the very balancing process upon which it is premised, will be undermined if this Court rules, as petitioner seeks, that the mere

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<sup>1</sup> The court below specifically refrained from passing on the question of whether a strike to force immediate recognition absent any prior demand therefor is lawful (App. A, p. 24, note 4). In its Petition For A Writ of Certiorari (pp. 11-12, 18-21), petitioner treats the legal principles to be derived as equally applicable whether the strike be considered one to pressure consent to an election or to force immediate recognition without any prior demand. (App. D, pps. 39-40). Under such circumstances, and for the reasons specified by respondent earlier, such effort disproportionately to expand the concept of "protected, concerted activity" must be dealt with and confined within meaningful limits (Respondent's Answer to Petition).

occurrence of an unfair labor practice during the course of a strike, without evidence or analysis of its effect, if any, on the strikers, automatically converts the purpose and objective of the strike activity.

The "mechanical rule" of "automatic conversion" for which petitioner seeks this Court's approval would eradicate the finely drawn distinctions between the economic-striker-reinstatement rule<sup>2</sup> and the unfair-labor-practice-striker reinstatement rule.<sup>3</sup> These established distinctions carry with them important practical remedial consequences and are of substantive import in the accommodation or balancing process which is the fabric of federal labor law.<sup>4</sup> The determination as to which of these rules applies in a given case should not therefor depend on mere assumption which has no necessary logical predicate. Petitioner's affirmative assertion of its "mechanical" rule under the strike circumstances present here "would, far from promoting the peaceful settlement of labor disputes, inject a judicially fashioned element of chaos into the field of labor relations" (*N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F. 2d 457, 465 (2d Cir. 1958)).

The importance to the Chamber of a resolution of the issue presented traces to the continuing need to illuminate the balance which the National Labor Relations Act effects between the protection of strikers' rights and the recognition of employers' legitimate needs.<sup>5</sup>

<sup>2</sup> *N.L.R.B. v. Fleetwood Trailers Co.*, supra; *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

<sup>3</sup> *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956).

<sup>4</sup> *Retail, Wholesale and Department Store Union v. N.L.R.B.*, — F. 2d —, 80 LRRM 3244 (D.C. Cir. 1972).

<sup>5</sup> The Court has affirmed the fact that the Act's purpose to promote labor stability and industrial peace and order is of equivalent significance with its protection of strike or other union activity. *Boy's Market, Inc. v. Retail Clerks*, 398 U.S. 235 (1970); *Central Hardware Company v. N.L.R.B.*, — U.S. —, 80 LRRM 2769 (1972).



The Chamber has, in the past, appeared as *amicus curiae* in this Court in order to participate and assist in the task of striking that balance in a wide range of labor relations matters of vital concern to its members.<sup>\*</sup> The Chamber's instant effort is similarly motivated.

### STATEMENT OF THE CASE

The full import of the strike-conversion rule which the Board would have this Court adopt can best be appreciated when applied to the facts presented in this case.

The record reveals that neither the respondent-employer nor, more significantly, the employees whose rights are involved, were informed or knew the purpose or causes for the union's picketing activity when such activity began at the respondent-employer's business premises on October 4, 1967. The union, which had never demanded recognition from the respondent-employer either at the time it filed its petition for recognition or when it began picketing, gave varying "reasons" for the direction of economic pressures against this respondent-employer; thus, according to the union, the "object" of the picketing was *either* to force agreement to a consent election which the union inaccurately informed respondent's employees had been withdrawn by respondent, *or* to force recognition without an election, *or* to "protest" the discharges of employees employed by other van and storage companies the union was concurrently attempting to organize, *or* for other purposes still undisclosed. Regardless of the multiple "causes" the union attributed to the commencement of picketing activities against the respondent-employer, the strikers' purpose or motivation in striking is revealed by

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<sup>\*</sup> For example, *H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99 (1970); *Boy's Market, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B. v. Pittsburgh Plate Glass Co.*, — U.S. — 30 L. Ed. 2d 341 (1971); *N.L.R.B. v. Burns International Security Services, Inc.*, — U.S. —, 80 LRRM 2225 (1972).



the following: first, the employees of the respondent-employer did not participate in the picketing activity when it began, did not know it would occur when it did and did not know what it was about when it started in the morning of October 4; second, respondent's employees refused to come to work by crossing the "stranger" picket line only because of their confusion with regard to the purpose, meaning, and effect of the picketing; and third, the extent to which the alleged unfair labor practices motivated the strikers is revealed in the fact that their applications for reinstatement were conditioned upon the execution of a collective bargaining agreement and were silent as to the existence of any unlawful practices or the need to remedy them. (A. 18, 19, 23, 26-29, 32-37, 49-51).'

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'The question as to whether the strikers were discharged and not merely replaced, while not specifically raised by the parties, is worthy of this Court's attention. The issue centers on the respondent's telegram of October 5, 1967 notifying employees that "for failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967 you are being permanently replaced." Had the telegram simply stated the fact of replacement without explanation, that would presumably not have offended the law in any party's view. That the respondent had specific shipping requirements, essential for his business welfare, scheduled for October 4 is not in question. Since the justification for permitting replacements is grounded in a recognized need for the struck employer to continue to run his business, and since the employer here had every reason to expect that the striking employees who were absent on October 4 would not return to work on October 5 to perform essential work, therefore their replacement was a reasonable and permissible act under the circumstances. The telegram of October 4 merely telescoped these propositions.

Even should the strikers be deemed to have been discharged, there is no record basis for concluding that they understood other than they had been replaced, as the telegram stated.

(With the exception of record evidence demonstrating the employees' ignorance of the purpose for the picketing on October 4 or the fact such activity would occur when it did, the facts set out in the text above are contained and set out in the petitioner's "Statement" of its Findings of Fact (Petitioner's Brief, pps. 3-7) and in respondent's supplementary "Statement of the Case" (Re-

That these facts were deemed by the Board to constitute an appropriate vehicle for the application of its rule effecting an automatic conversion of an economic to an unfair labor practice strike demonstrates the need to affirm the decision below. For the combination of the strikers' total confusion as to the purpose for the strike, the unions' multiple and inconsistent subsequent explanations of its objective, the likelihood that different employees would therefore have different views as to the strike's goal, and the evidence afforded by the nature of the qualified applications for reinstatement—cumulatively negative the probability that these strikers changed "the" object of the strike or that they "prolonged" their activity as a consequence of unlawful conduct as to which their reinstatement applications made no express mention.

### SUMMARY OF ARGUMENT

1.) The rules relating to the reinstatement rights of economic strikers were created to achieve different objectives, to effect a differing balance between employees' and employers' needs and to afford a different level of relief than rules relating to the reinstatement rights of unfair labor practice strikers. The latter rules are designed not merely to protect strikers' status as "employees", but affirmatively to protect their right to protest and seek relief through self-help against unlawful conduct whose impact consciously leads the strikers to prolong their strike in specific protest against such conduct.

The Circuit Courts of Appeals, including the court below, have held that the commission by an employer of unlawful acts during an economic strike does not con-

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spondent's Brief, pps. 7-8). The facts reflecting the lack of knowledge by respondent's employees with respect to the reasons for or timing of the union's picketing activity on October 4 are contained and set out in Pet. Appendix D, pps. 38-42 and Pet. Appendix D, pps. 52-60.)

vert the status of economic strikers to those of unfair labor practice strikers absent proof that the strikers altered their strike purpose and prolonged their strike as a direct result of such improper conduct. The Board's contrary view that unfair labor practices automatically or necessarily convert the nature of an economic strike, without any need for specific evidence or proof, fails to preserve the distinctions between these categories of strikers, fails to give effect to the logic of the unfair-labor-practice-striker rule, and constitutes a conflict with the Circuit Courts which requires resolution by this Court in the interest of a uniform and predictable application of the labor laws.

2.) A strike whose purpose is to prohibit or impede any person's access to the processes of the Board is contrary to sound policy and to Congress' intent in creating a guaranteed statutory framework for the resolution of disputes. Those who participate in such a strike do not engage in activity which is protected by Section 7 of the National Labor Relations Act. (*N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418 (1968)). The strike in this case was designed, according to the Board's findings, to compel the employer's consent to an election despite the pendency of representation proceedings before the Board or to compel immediate recognition of the union absent an election. The success of either purpose would force the employer to forego the rights and protections guaranteed in the statute to a full hearing (Section 9(c)) and an election in which to determine the employees' union preferences (*N.L.R.B. v. Gissell Packing Co.*, 395 U.S. 575 (1969)). Since in either event the strikers' object was to coerce the employer's abandonment of a statutory right to access to Board processes, the conduct of the strikers was not protected by Section 7 of the Act.

## ARGUMENT

### A. The Commission Of Unfair Labor Practices During An Economic Strike Should Not Automatically And Without Further Investigation Convert The Strike Into An Unfair Labor Practice Strike.

This Court and the Courts of Appeal, with rare exceptions (e.g., *N.L.R.B. v. Katz*, 369 U.S. 736 (1962)), have refused to sanction the automatic application of mechanical rules by the petitioner-Board in the complex socio-economic area of labor law. Such a refusal is the substance of the rejection by the court below of the Board's finding, without analysis or evidence, that the "natural effect" of "discharge" of the economic strikers converted the economic walkout into an unfair labor practice strike (Appendix D, p. 41). The court below properly found that absence of *any* evidence in support of that supposed "necessary" effect precluded enforcement of such an easy finding of "conversion" (Appendix A, pps. 27 and 28 and Note 5).

The insistence of the court below upon *proof of conversion of the strike activity* is the only proper approach to preservation of the substantial distinctions flowing from the economic-striker-reinstatement and unfair-labor-practice-striker reinstatement rules.\*

Each rule, with the panoply of rights and obligations attendant to it contains strong protections for the right to strike balanced against the employers' need to operate their business enterprises.\* Since each rule represents a

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\* *N.L.R.B. v. Fleetwood Trailers Co.*, 389 U.S. 375 (1967); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270 (1956); *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

\* The operation of these rules involves variables which affect the result in each case and seek to conform the operations of the rules to the equity of the situations they govern. These variables include, for example, for example, the nature of the strikers' conduct

separate remedial need, to apply one where the other is appropriate adversely affects the statutory scheme laboriously fashioned by Congress and the courts.

**1) Courts Have Not Approved The Board's Theory of "Automatic Conversion" Of Strike Objectives.**

The very nature of the economic-striker and unfair-labor-practice striker rules, and the substantial difference in the degree of protection which each affords has consistently led courts to an avoidance of mechanical rules in determining which rule applies in a given case.

With the exception of those cases where the unfair labor practices committed are so "flagrant" that the only rational inference is that strike activity must have been prolonged as a result, (*N.L.R.B. v. Supreme Dyeing & Finishing Corp.*, 340 F. 2d 493 (1965)), all the Circuits require analysis of the initial "cause" or "causes" of the strike activity and a demonstration of causal relationship between the unfair practices alleged to have occurred and prolongation of the strike activity. Thus, although the Second Circuit has upheld a finding of conversion where the employer's unfair labor practices are "ongoing" thereby "necessarily" prolonging the

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as contrasted with the severity of the employers' acts (*N.L.R.B. v. Thayer Co.*, 213 F. 2d 748 (1st Cir. 1954)); the character and timing of requests for reinstatement (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); the permanency of replacement (*Retail, Wholesale and Department Store Union v. N.L.R.B.*, — F. 2d —, 80 LRRM 3244 (DC Cir. 1972), *Laidlaw Corp. v. N.L.R.B.*, 414 F. 2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970)).

The nature and operation of these variables are, of course, subject to continuing review in terms of their effect on the proper balance to be accorded to the parties' competing needs. *Laidlaw*, for example, presents serious problems to an employer's efficient administration of his business in seeking, in effect, to create an open-ended duty to reinstate "replaced" economic strikers.

strike<sup>10</sup> each of those cases involved specific evidence of anti-union motivation underlying the unfair practices involved. Where, however, the unfair practices are not of such "flagrant" and "ongoing" character, the Second Circuit requires analysis and evidentiary proof of causal relationship between the employer unfair conduct and strike prolongation.<sup>11</sup> The same distinction between "flagrant, ongoing" unfair practices which do not require specific evidence of prolongation and those cases where strike conversion must be proven by specific evidence of causal relationship is reflected in the decisions of the Third Circuit,<sup>12</sup> the Fifth Circuit,<sup>13</sup> the Seventh Circuit,<sup>14</sup> and the Tenth Circuit.<sup>15</sup> The District of Columbia Circuit regularly demands analysis of the strike's

<sup>10</sup> *N.L.R.B. v. Pecheur Lozenge Co.*, 209 F. 2d 393, 404 (1953), cert. denied, 347 U.S. 953 (1954); *N.L.R.B. v. Remington Rand, Inc.*, 130 F. 2d 919, 928 (1942); *Black Diamond S.S. Corp. v. N.L.R.B.*, 94 F. 2d 875, 879, cert. denied, 304 U.S. 579 (1938).

<sup>11</sup> *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743, 749 (1953).

<sup>12</sup> *International Electrical, Radio & Machine Workers, Local 613, v. N.L.R.B.*, 328 F. 2d 723, 725-726 (1964) requiring specific evidence of prolongation; *N.L.R.B. v. Crowley's Milk Co.*, 208 F. 2d 444, 445 (1958).

<sup>13</sup> *Southwestern Pipe, Inc. v. N.L.R.B.*, 444 F. 2d 340 (1971), reversing the Board because of absence of proof of causal connection between the unfair labor practice and the strike; *N.L.R.B. v. Southern Beverage Co.*, 423 F. 2d 720 (1970); *N.L.R.B. v. Flowers Baking Co.*, 418 F. 2d 244 (1969); *N.L.R.B. v. Trinity Valley Iron & Steel Co.*, 290 F. 2d 47 (1961); and *N.L.R.B. v. Reliance Clay Products Co.*, 245 F. 2d 599 (1957).

<sup>14</sup> *Griffin Pipe Div. of Griffin Wheel Co. v. N.L.R.B.*, 320 F. 2d 656, 659 (1963), *N.L.R.B. v. Jackson Press Inc.*, 201 F. 2d 541, 546 (1953) and *M. H. Ritswoller v. N.L.R.B.*, 114 F. 2d 432, 433 (1940), all requiring specific evidence and findings of "prolongation"; *N.L.R.B. v. Waukesha Lime & Stone Co.*, 343 F. 2d 504 (1965).

<sup>15</sup> *Kansas Milling Co. v. N.L.R.B.*, 185 F. 2d 413, 420 (1950) requiring proof of causal connection; *N.L.R.B. v. Johnson Sheet Metal, Inc.*, 442 F. 2d 1056 (1971).



initial causes and specific evidence of prolongation in "conversion" cases.<sup>18</sup> The Sixth Circuit, although recognizing the proof of "prolongation" requirement, holds that once employer unfair practices are proven, the burden of showing absence of causal connection falls upon the employer.<sup>17</sup> Similarly, the Fourth Circuit demands proof of causal connection between the unfair practice and the strike's prolongation, but imposes the duty upon the Board's General Counsel to carry the burden of producing evidence showing prolongation before any finding of "conversion" will be upheld.<sup>18</sup> The court below, although on occasion finding conversion absent proof of causal connection and prolongation,<sup>19</sup> has acknowledged that the other Circuits require a causal relationship between employer unfair labor practices and the prolongation of a strike,<sup>20</sup> and imposed that requirement in the case at bar (App. A, pp. 27 and 28 and Note 5).

Thus, absent at least some probative evidence to determine that employees engaged in an economic strike did in fact alter and prolong their activity in view of the commission of some unlawful acts during a strike, the Circuit Courts have not permitted speculation to determine the parties' rights and duties.

<sup>18</sup> *Local 833, U.A.W. v. N.L.R.B.*, 300 F. 2d 699 (1962), cert. denied, 382 U.S. 836 (1965); *General Drivers & Helpers Local 652 v. N.L.R.B.*, 302 F. 2d 908, 911, cert. denied, 371 U.S. 826 (1962).

<sup>17</sup> *Phillip Carey Mfg. Co. v. N.L.R.B.*, 331 F. 2d 720, 728-729 cert. denied, 379 U.S. 888 (1964); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 236 F. 2d 898, 907 (1956), aff'd. in part, reversed in part and remanded in part on other issues, 356 U.S. 342 (1958).

<sup>16</sup> *Winn-Dixie Stores, Inc. v. N.L.R.B.*, — F. 2d — (1971); *Alba-Waldensian, Inc. v. N.L.R.B.*, 404 F. 2d 1370, 1371 (1968); *Jeffery-DeWitt Insulator Co. v. N.L.R.B.*, 91 F. 2d 134, 139, cert. denied, 302 U.S. 731 (1937).

<sup>19</sup> *N.L.R.B. v. Tom Joyce Floors, Inc.*, 353 F. 2d 768, 772 (9th Cir. 1958).

<sup>20</sup> *N.L.R.B. v. Scott & Scott*, 245 F. 2d 926, 929 (9th Cir. 1957).



That the Board nonetheless persists in asserting as it does here, that conversion of the strike is automatic upon the commission of such unlawful acts, establishes a need for this Court to declare the impropriety either of the Board's approach to the question or that of the courts.

**2) *The Courts' Approach To The Analysis Of Strike Conversion Is Correct.***

The necessity for proof of strike "causation" and "motivation", both from the standpoint of the strike's initiation as well as where its objective is alleged to have been "converted", is inherent in the rationale of the unfair-labor-practice-striker rule and the broader protections it affords employees under the act. Thus, the logic of providing unfair practice strikers with reinstatement rights not extended to economic strikers<sup>21</sup> and with greater potential for back pay<sup>22</sup> and the reasoning behind shelter-

<sup>21</sup> An economic striker may be permanently replaced at any time prior to his unconditional application for reinstatement (*N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-346 (1938)) although retaining certain as yet not fully defined (See, e.g., *Martin, Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 Wis. L. Rev. 1062) preferential rehire rights after permanent replacement (*N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-381 (1967); *Laidlaw Corp. v. N.L.R.B.*, 414 F. 2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970)). By comparison, an unfair labor practice striker is entitled to immediate reinstatement upon unconditional application therefor and cannot be permanently replaced either before or after such application (*N.L.R.B. v. Foteochrome, Inc.*, 343 F. 2d 631 (2d Cir.), cert. denied, 382 U.S. 833 (1965); *N.L.R.B. v. Dubo Mfg. Corp.*, 353 F. 2d 157 (6th Cir. 1965).

<sup>22</sup> Coincident with the greater reinstatement rights of unfair labor practice strikers discussed in Note 21 *supra*, the unfair practice striker is entitled to back pay from the time he qualifies for reinstatement until he is either offered reinstatement or is actually reinstated, whereas the economic striker who makes unconditional application is able to collect back pay, if any, only from the date substantially equivalent jobs are available. E.g., *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954).

ing the unprotected activity of unfair labor practice strikers while denying such shelter to the same activity of economic strikers (*N.L.R.B. v. Thayer, supra.*) purportedly rests upon a need to encourage activities designed to "protest" and "remedy" the commission of unfair labor practices.<sup>22</sup> Similarly, the release of unfair labor practice strikers from the contractual restraints

<sup>22</sup> *Mastro Plastics Corp. v. N.L.R.B., supra; N.L.R.B. v. Thayer, supra.*

A predicate for the theory and rationale for extending greater protections to unfair labor strikers than to those who strike in support of "economic" demands is that such additional encouragement is necessary to allow employees either to replace or supplement the unfair labor practice procedures and remedies of the National Labor Relations Board. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 82-83 (1947), in relevant part, states:

"(3) Employee—The House bill changed the definition of 'employee' contained in the existing law in several respects:

(A) Under the existing definition of 'employee' the Board has treated employees striking for wages, hours, or working conditions differently from employees striking because of an alleged unfair labor practice on the part of the employer. In the former case the Board has said that the individual striker retains his status as an employee under the act only until he is replaced, whereas in the latter case the Board has said that the individual striker retains his status as an employee so long as the labor dispute is 'current'. This Board practice has had the effect of treating more favorably employees striking to remedy practices for which the National Labor Relations Act itself provides a peaceful administrative remedy, than employees who are striking merely to better their terms of employment. The House bill in the definition of employee provided in specific terms that these two classes of striking employees should be treated in the same fashion, i.e., they were to retain their employee status until replaced.

... (c) The conference agreement does not contain the specific provisions of the House bill dealing with the status of 'unfair labor practice' strikers. Since the different treatment of unfair labor practice strikers and economic strikers is simply a practice of the Board which the Board can change within the framework of the existing law, it was thought by the House managers that the Board should be given an opportunity to change this practice itself rather than needlessly complicating the definition of the term 'employee'."

applicable to economic strikers<sup>24</sup> and the exemption of unfair labor practice strikers from the provision of Section 8(d)(4) of the Act involving strikers' loss of their status as "employees".—which provision remains applicable to economic strikers,—are premised upon an alleged necessity to effectuate remedial self-help by strikers who feel their rights jeopardized by specific unlawful conduct.<sup>25</sup>

However, the need for effective means to protest or remedy another's unlawful acts must presuppose both knowledge of such acts and a concern as to their impact sufficient to motivate a specific exercise of protest. Employees not so motivated, whether through lack of information, lack of concern because the unlawful acts are in their view minor or otherwise subject to correction in arbitration or NLRB proceedings, because of their consuming concern for their economic objectives, or otherwise, do not fall within the class of persons for whom the protections of the unfair-labor-practice-striker rule were created. The requirement of this rule that the alleged unfair practices "prolong" the strike emphasizes the requirement that for its operation those practices must constitute a specific, serious and independent focus of the strikers' protest.

<sup>24</sup> For example, the operation of contractual "no-strike" clauses. *Mastro Plastics Corp. v. N.L.R.B.*, *supra*. The effect of this Court's decision in this context of *Boy's Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970) is perhaps open to doubt. This Court was not presented with and did not decide the question whether an injunction would lie against an unfair labor practice strike during the term of a labor agreement containing a "general" no-strike clause and provisions for arbitration. Subsequent cases appear to have applied *Boy's Markets* to economic strike situations only." E.g. *Ice Cream Drivers v. Borden, Inc.*, 433 F. 2d 41 (2d Cir. 1970), cert. denied, 401 U.S. 940 (1971).

<sup>25</sup> The concept of encouraging self-help remedies in the context of a statutory scheme which itself affords remedies for unfair labor practices warrants a re-examination of the continuing validity of the unfair-labor-practice-striker rule.

It should be emphasized that it is entirely reasonable that the employer's commission of unlawful acts, even when known, may be deemed by the strikers to be minor or a predictable outgrowth of the strike, and not engender the concern leading to a prolongation or alteration of that strike. To an increasingly sophisticated labor movement the availability of arbitration and the NLRB as forums for the resolution of alleged unfair labor practices cannot be discounted; their availability may well induce strikers to rely on such formal procedures, especially since resulting decisions have prospective value as precedent which would be lacking in a particular strike-forced capitulation on the same issue. And the imputation to economic strikers of knowledge of the commission of unfair labor practices following the inception of the strike may well be unwarranted. For example, an employer's refusal to provide the union with certain requested information unrelated to a then-current economic strike may constitute an unfair labor practice, but it is not likely that such a statutory violation would become known to employees then striking for economic benefits. Similarly, an employer's unilateral adoption of a new work rule enforced against unit employees working in the plant may not reliably be expected to come to the attention of other unit employees then engaged in an economic strike. In neither case is the nature of the violative conduct likely to result in a change in the focus of the strike or to prolong it.<sup>26</sup>

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<sup>26</sup> The question of strikers' knowledge of the occurrence of unlawful conduct is presented in an aggravated form in cases where the finding of an employer's unfair labor practice is a result of a change in the law rendered after the conduct in question had occurred but announced in connection with other litigation concerning the strike. Would economic strikers become converted to unfair labor practice strikers in such a case under the Board's automatic-conversion theory? The retroactive effect given by the Board to substantive changes in the law makes such an inequitable result possible. See *Laidlaw Corp. v. N.L.R.B.*, *supra*.

It follows, therefore, that the reinstatement and back-pay rights of strikers who commenced an economic strike should not be governed by the Board's view that the commission of any unfair labor practices by the employer during the strike automatically converts such strikers to unfair labor practice strikers on the *assumption* that such practices *necessarily* changed the purpose of and prolonged the strike. Rather, as the rationale for the existence of the unfair-labor-practice-striker rule requires, the commission after the inception of a strike of unfair labor practices cannot be presumed to convert the status of the strikers absent proof that the purpose, outcome and duration of the strike had been altered as a consequence of such conduct.

**B. The Strike Herein Was Not Activity Protected By The Act.**

The goal of the union's strike activity in this case was to force the employer to agree to a consent election during the pendency of representation proceedings before the Board or to compel recognition by the employer without prior demand and without an election, or both. It is submitted that a union's strike to achieve either objective should be considered unprotected activity under the Act.<sup>27</sup> This is an issue to which the Court has not yet specifically addressed itself.

Section 9(c) (1) of the Act provides that:

"Whenever a petition shall have been filed . . . the Board *shall* investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall* provide

<sup>27</sup> The Board's view is, and has been, to the contrary. *Philans Oldsmobile, Inc.*, 137 NLRB 867; *New Orleans Roosevelt Corp.*, 132 NLRB 248. However, apart from the absence of judicial support for the Board's position, subsequent decisions of this Court would seem to compel a contrary view, as noted *infra*.

for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballot and certify the results thereof." (Emphasis added)

This statutory provision creates a right to access to the Board's procedures in cases raising representation questions, and creates certain procedural guarantees to the parties to assure them a full and fair hearing of their views. The repeated Congressional use of the mandatory "shall" constitutes an element of the rights conferred on the parties named in or affected by such a petition. A strike to compel the holding of a consent election during the pendency of such a petition constitutes an effort to force the employer to forego access to the Board's processes and the guarantees and protections afforded by the opportunity for hearing and Board decision contemplated in Section 9. This Court has recently held, in an analogous situation, that such an effort is unlawful. In *N.L.R.B. v. Industrial Union of Marine Shipbuilding Workers*, 391 U.S. 418 (1968), the Court held to be violative of Section 8(b) (1) (A) a union's action in expelling and fining various of its members who had filed unfair labor practice charges against the union. The theory behind that holding was that conduct aimed at prohibiting or limiting access to the procedures of the Board was contrary to public policy and Congress' will. The same theory applied to the instant case should find the union in violation of the same statutory provision. At a minimum, it should be held that those who strike for such an objective do not engage in conduct affirmatively protected by Section 7 of the Act.

Similarly, a strike to force immediate recognition of the union, without prior demand and without permitting access to the Board's election machinery, constitutes an effort to deprive employers of the rights recognized by this Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S.



575 (1969). It was held there that in the absence of unfair labor practices by the employer which would prevent the holding of a fair election, an employer was entitled, as of right, to access to the Board's representation machinery in order to determine the union preferences of his employees.<sup>22</sup> The rationale of *Shipbuilding Workers* also applies to such an effort to force employers to forego their statutory rights and access to the Board. And, similarly, the activities of the strikers should not be deemed to be protected by Section 7.

In *N.L.R.B. v. Thayer, supra*, the First Circuit established certain accepted ground rules for the analysis of these matters. If an economic strike is not within the protection conferred by Section 7, the employer may terminate the employment of the strikers without violating the Act; that is, such terminations would not restrain or coerce employees in the exercise of their Section 7 rights. Since the Board's authority to order reinstatement derives from Section 10(c) and is dependent upon the commission of an unfair labor practice, therefore the reinstatement of an economic striker cannot be ordered by the Board unless the failure to reinstate would constitute an unfair labor practice; if the economic strike is not protected by Section 7, therefore, the discharge or failure to reinstate any of the strikers would not be remedied by the Board.

In the instant case, even assuming, arguendo, that the economic strikers had been discharged by the employer and had not been merely permanently replaced, since a strike to obtain recognition or to compel agreement to a consent election should not be viewed as protected by Section 7 (*Shipbuilding Workers, supra*), such "discharges" would not be prohibited by the Act.

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<sup>22</sup> In the instant case the alleged unfair labor practices of the employer occurred *after* the commencement of the strike in which the union sought to compel recognition or a consent election.



**CONCLUSION**

For the reasons stated herein, together with those raised by the respondent, it is urged that the decision below be affirmed with respect to the question of the requirements for conversion of an economic strike to an unfair labor practice strike, but that the Court should also declare that "economic" strikes to compel recognition or to force agreements to consent election, are not protected activities under Section 7 of the Act.

Respectfully submitted,

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 1971

No. 71-895

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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL VAN LINES,

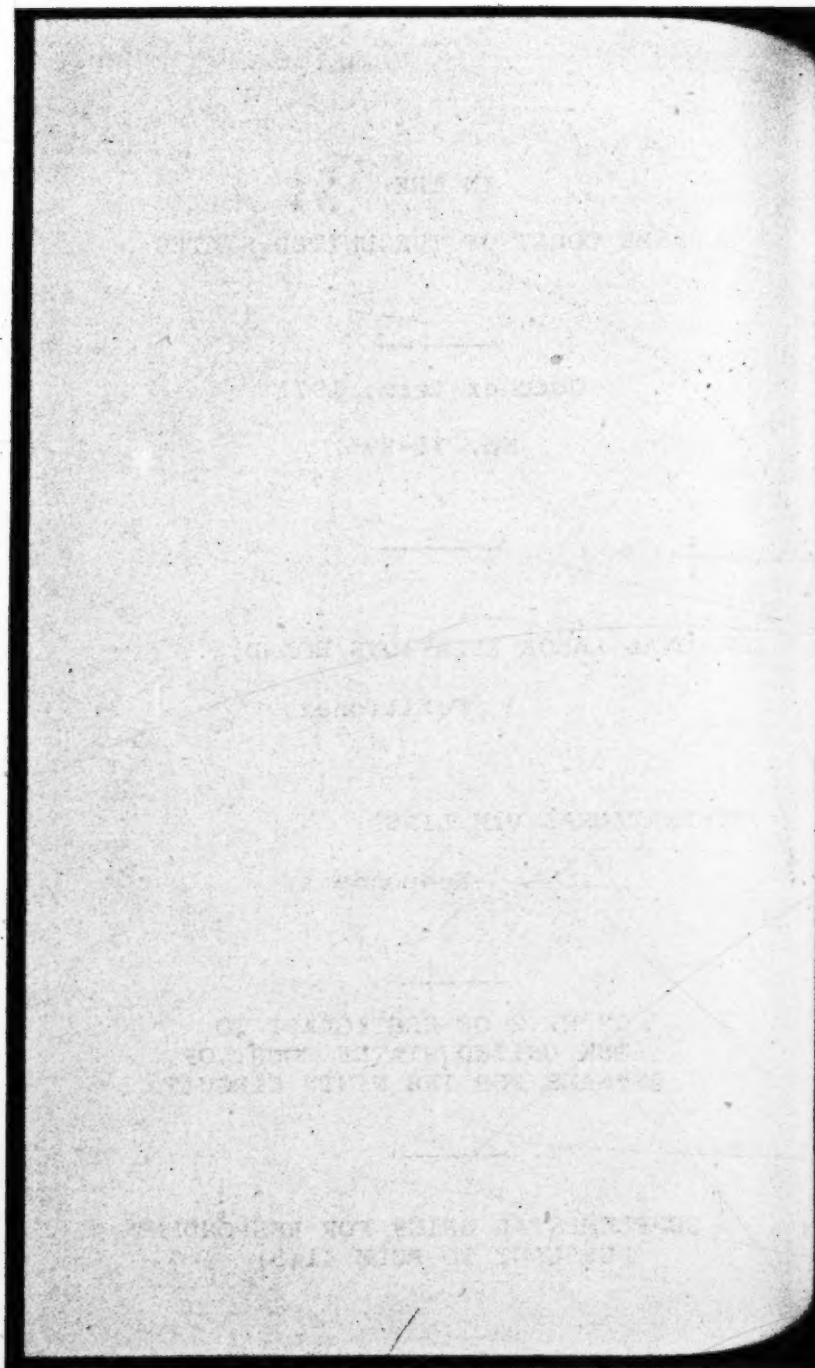
Respondent.

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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF FOR RESPONDENT  
PURSUANT TO RULE 41(5)



In support of the position that Respondent's Answer filed in the nature of a Cross Petition was timely filed and that the questions presented therein are properly before the Court, the following supplemental points and authorities are hereby respectfully submitted pursuant to Rule 41(5) of the Court.

The Board is in error when it characterizes the "opinion" of the Court of Appeals as a "judgment". (Board's Reply Memorandum, page 2). The Circuit Court remanded the case to the Board for further proceedings to determine (1) whether legitimate and substantial business justification existed for not reinstating the four employees and to resolve (2) an ambiguity in the record relating to employee Casillas. Further, the Court of Appeals declined to pass upon the propriety of the bargaining order, stating that, "It will be time enough to do so if the case comes before us again on the Board's petition for enforcement."

The Court below concluded by saying,

"The case is remanded to the Board for the determination required by Part C of this opinion and for modification of the Board's order in accordance with Part A of the opinion" (emphasis added) 448 F.2d 905, at 912, 913.

It is clear then that no final judgment or decree was entered which would start the running of the ninety (90) day period. Rogers v. Hill, 289 U.S. 582; Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374. Cf. Scofield v. NLRB, 394 U.S. 423.





Accordingly, Respondent's Answer, which must be viewed as an Answer and Cross Petition was timely and may be considered by the Court, if the questions presented therein are, as Respondent believes, significant and worthy of consideration.

Dated, October 6, 1972.

Respectfully submitted,

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the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-695

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES

Writ of Certiorari to the United States Court of  
Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent's basic argument is that the strikers were not entitled to reinstatement at all because the strike and the picketing were not protected by Section 7 of the Act (Co. Br. 14-32). For the reasons given in our opening brief (Bd. Br. 18-21) and those set forth below, this contention provides no basis for upholding the court of appeals' judgment.

Respondent contends that, even if the object of the strike was to force it to consent to an election, as the court of appeals found, the strike was not protected by Section 7. For, respondent argues, since Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), provides for a hearing on a representation petition prior

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ation as the representative of its employees, and its subsequent refusal to recognize the Union was a rejection of that demand. Accordingly, the Union's petition was a valid one which could have served as a basis for a Board election\* had respondent refrained from unfair labor practices which precluded the holding of a fair election.

#### CONCLUSION

For these reasons, as well as those set forth in the Board's main brief, the judgment of the court below should be reversed insofar as it denies enforcement of the provisions of the Board's order requiring that Richard Dicus, Manuel and Robert Vasquez, and Salvador Casillas be reinstated with back pay.

Respectfully submitted.

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*General Counsel,*

PATRICK HARDIN,  
*Associate General Counsel,*

NORTON J. COME,  
*Assistant General Counsel,*

LINDA SHER,  
*Attorney, National Labor Relations Board.*

OCTOBER 1972.

\*In any event, under the first proviso to Section 8(b) (7) (C), the Board may direct an election "without regard to the provisions of section 9(c) (1)."



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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

### Syllabus

### NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL VAN LINES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

No. 71-895. Argued October 12, 1972—Decided November 7, 1972

Four employees of respondent refused to cross a picket line formed in connection with a union's organization campaign. Respondent thereafter advised the employees that because of their failure to report to work they were being permanently replaced, which was not true at the time of the discharges. When respondent refused reinstatement, charges were filed with the National Labor Relations Board (NLRB). Concluding that the discharges were unfair labor practices under the National Labor Relations Act, and that the employees thereby became unfair labor practice strikers, the NLRB ordered unconditional reinstatement with back pay. The Court of Appeals reversed that portion of the NLRB's order, holding that the employees were not unfair labor practice strikers, who were entitled to unconditional reinstatement, but economic strikers, who were not entitled to reinstatement if the employer had substantial business justifications for refusing to rehire them. *Held*: The unconditional reinstatement of the employees was proper since their discriminatory discharges prior to the time their places were filled constituted unfair labor practices regardless of whether they were economic strikers or unfair labor practice strikers. Pp. 4-5.

448 F. 2d 905, reversed in part.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, POWELL, and BRENNAN, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment.



IN THE COURT OF THE UNITED STATES

WILLIAM LAMAR WHEELER, Plaintiff,  
vs.  
UNITED STATES, Defendant.

ALABAMA, State of, ss. I, the undersigned, Clerk of the Court of the United States for the Southern District of Alabama, do hereby certify that the within and foregoing is a true and correct copy of the original filed in my office.

Witness my hand and the seal of said Court at the City of Montgomery, Alabama, this 1st day of January, 1901.

CLERK OF THE COURT.

WILLIAM LAMAR WHEELER, Plaintiff,  
vs.  
UNITED STATES, Defendant.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20545, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 71-895

National Labor Relations Board, Petitioner,	} On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
v.	
International Van Lines.	

[November 7, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent is a moving and storage company based in Santa Maria, California. In August 1967, Local 381 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America began a campaign to organize the employees of moving and storage firms in the area. By September 21, five of the respondent's employees had signed union authorization cards; it is undisputed that they constituted a clear majority of what would be an appropriate bargaining unit. Instead of demanding recognition by the respondent, the Union on September 21, 1967, petitioned the National Labor Relations Board for certification as the exclusive bargaining agent of the respondent's employees.

Shortly thereafter, on October 2 and 3, the Union held meetings where it was announced that the respondent had at first consented to a representation election but had later withdrawn its consent. It was decided at the October 3 meeting that all of the moving and storage companies involved in the Union organization campaign should be struck, and on October 4, picketing commenced at the respondent's place of business.

Four of the respondent's employees, Robert and Manuel Vasquez, Richard Dicus, and Salvador Casillas, were

present at the respondent's premises on the morning when picketing commenced. They refused to cross the picket line. The next morning, Robert and Manuel Vasquez and Richard Dicus received identical telegrams which read: "For failure to report to work as directed at 7 A. M. on Wednesday morning Oct. 4, 1967, you are being permanently replaced. [Signed] International Van Lines."<sup>1</sup> It is undisputed that at the time of the discharges, the respondent had not in fact hired permanent replacements.

Casillas sought reinstatement in late November, and the other three discharged employees made unconditional offers to return to work on December 12. At least as to these three,<sup>2</sup> the respondent refused reinstatement, claiming that it had at that point hired permanent replacements. The Union then went to the National Labor Relations Board with unfair labor practice charges against the respondent.

The Board determined that the labor picketing that commenced on October 4 was activity protected under § 7 of the National Labor Relations Act, 29 U. S. C. § 157, and concluded that the subsequent discharges of striking employees discriminated against lawful union activity and were unfair labor practices under §§ 8 (a)(1) and 8 (a)(3) of the Act, 29 U. S. C. §§ 158 (a)(1), (a)(3).

It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements. *NLRB v. Mackay Radio & Tele-*

<sup>1</sup> Casillas did not receive such a telegram, but the Court of Appeals found that he was discharged at about the same time as the other three, and for the same reasons. 448 F. 2d 905, 906.

<sup>2</sup> There remains some question as to whether Casillas, a part-time employee, was actually denied subsequent employment or whether instead there had been no occasion for the employer to use his services. The Court of Appeals remanded to the Board for a determination of this question—a determination that will affect the amount of back pay, if any, that Casillas is entitled to receive.

graph Co., 304 U. S. 333, 345-346. It is equally settled that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or statutory provision to the contrary, to unconditional reinstatement with back pay, "even if replacements for them have been made." *Mastro Plastics Corp. v. NLRB*, 350 U. S. 270, 278. Since the strike in the instant case continued after the unfair labor practices had been committed by the employer, the Board reasoned that the original economic strike became an unfair labor practice strike on October 5, when the three telegrams were sent. The Board held the four employees to be unfair labor practice strikers and, accordingly, ordered their unconditional reinstatement with back pay.

The Board then sought enforcement of its order in the Court of Appeals for the Ninth Circuit. The Court of Appeals agreed that the labor picketing was a lawful economic strike, and that the discharges of the striking employees were unfair labor practices. 448 F. 2d 905, 910-911. Nevertheless, the Court of Appeals reversed the portion of the Board's order providing for reinstatement with back pay,<sup>1</sup> reasoning as follows:

"The strikers whose discharges constituted the unfair labor practice were, at the time of their discharges, protesting only the original grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their

<sup>1</sup> The Court of Appeals also rejected the Board's finding of an unfair labor practice in the form of conversations between the son of the respondent's president and the employees, 448 F. 2d 905, 908-909, but this aspect of the judgment is not before us.

co-workers who had not yet been discharged would eliminate the distinction between [the] economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics*) in cases like this one." 448 F. 2d 905, 911-912.

Consistent with its determination that the discharged employees were economic strikers entitled to reinstatement only if the employer could not show legitimate and substantial business justifications for refusing to take them back, the Court of Appeals remanded the case for further findings concerning the reasons for the employer's refusal to rehire them. 448 F. 2d 905, 912. Because this decision appeared to involve principles important to the administration of the National Labor Relations Act as amended, we granted the Board's petition for certiorari, 405 U. S. 953.

Both the Board and the Court of Appeals have agreed that the labor picketing was a lawful economic strike, and the validity of that conclusion is not before us.<sup>4</sup> Given that hypothesis, the Board and the Court of Appeals were clearly correct in concluding that the respondent committed unfair labor practices when it fired its striking employees. "[T]he discharge of economic strikers prior . . . to the time their places are filled constitutes an unfair labor practice." *NLRB v. Globe Wire-*

<sup>4</sup> The Court of Appeals construed the picketing as a strike for the purpose of forcing the respondent employer to agree to a consent election, 448 F. 2d 905, 910, and held this to be protected under the Act. The respondent disagrees. But since no timely cross-petition for certiorari was filed by the respondents, this question is not before us. *Alaska Industrial Board v. Chugach Electric Assn.*, 358 U. S. 330, 325; *NLRB v. Express Publishing Co.*, 312 U. S. 426, 431-432; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191. We therefore proceed on the premise that the union was engaged in protected activity, while intimating no view on the merits of this portion of the decision of the Court of Appeals.

less, 193 F. 2d 748, 750; *NLRB v. Comfort, Inc.*, 365 F. 2d 867, 874; *NLRB v. McCatron*, 216 F. 2d 212, 215. We need not decide, however, whether the Board was correct in determining that the discharged employees assumed the status of unfair labor practice strikers on October 5, 1971, to reach the conclusion that the Court of Appeals erred in refusing to enforce the Board's order of reinstatement with back pay.

Unconditional reinstatement of the discharged employees was proper for the simple reason that they were the victims of a plain unfair labor practice by their employer. Quite apart from any characterization of the strike that continued after the wrongful discharges occurred, the discharges *themselves* were a sufficient ground for the Board's reinstatement order. "Reinstatement is the conventional correction for discriminatory discharges," *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 187, and was clearly within the Board's authority. 29 U. S. C. § 160 (c).

It would undercut the remedial powers of the Board with respect to § 8 violations, and subvert the protection of § 7 of the Act, to hold that the employees' rights to reinstatement arising from the discriminatory discharges were somehow forfeited merely because they continued for a time to engage in their lawful strike after the unfair labor practices had been committed.

The judgment of the Court of Appeals is reversed insofar as it refused to enforce the Board's order that the discharged employees be reinstated with back pay.\*

*It is so ordered.*

\* The Court of Appeals remanded to the Board for a determination of whether Casillas had actually been denied employment subsequent to his request for reinstatement, and did not reach the propriety of the bargaining order entered by the Board. We leave these aspects of the Court of Appeals decision undisturbed.







# SUPREME COURT OF THE UNITED STATES

No. 71-895

National Labor Relations Board, Petitioner,	} On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
v.	
International Van Lines.	

[November 7, 1972]

MR. JUSTICE BLACKMUN, concurring in the judgment.

The result mandated by the narrow factual situation presented in this case need not be automatically imposed whenever an economic striker is discharged before being permanently replaced. Although the Court's opinion speaks only of permanent replacement as a justification for refusal to reinstate an economic striker, the Court has recognized in the past that, in addition to permanent replacement, other "legitimate and substantial business justifications" for not reinstating an economic striker may exist. *NLRB v. Fleetwood Trailer Co.*, 389 U. S. 375, 378-380 (1967). The Court is not faced in the present case with other "legitimate and substantial business justifications" because the employer, who bears the burden of proof, asserted only the permanent-replacement justification. The finding of an unfair labor practice here is not to be read, therefore, as necessarily precluding an employer from reliance on appropriate justifications other than permanent replacement.

Since the employer failed to show any business justification arising before the discharges, these workers enjoyed reinstatement rights when they were discriminatorily discharged. I concur in the reversal of the Court of Appeals' judgment because preservation of the rights existing before the workers were discharged is the appropriate remedy to provide "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 194 (1941).